

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

LIQWD, INC., et al., :  
 :  
 Plaintiffs, : No. 1:17-cv-0014-JFB-SRF  
 :  
 v. :  
 :  
 L'OREAL USA, INC., et al., :  
 :  
 Defendants. :

Wednesday, December 12, 2018  
10:00 a.m.

Oral Argument  
Courtroom of Judge Sherry R. Fallon

844 King Street  
Wilmington, Delaware

BEFORE: THE HONORABLE Sherry R. Fallon,  
United States District Court Magistrate

APPEARANCES:

MORRIS, NICHOLS, ARSHT & TUNNELL LLP  
BY: JEREMY TIGAN, ESQ.

-and-

QUINN EMANUEL  
BY: JOSEPH PAUNOVICH, ESQ.

On behalf of Plaintiffs

1 APPEARANCES CONTINUED:

2 RICHARDS, LAYTON & FINGER, P.A.  
3 BY: KATHARINE MOWERY, ESQ.  
4 BY: FRED COTTRELL, ESQ.

5 -and-

6 PAUL HASTINGS  
7 BY: JOSEPH PALYS, ESQ.  
8 BY: KATHERINE MURRAY, ESQ.

9 On behalf of Defendants  
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1 THE COURT: Good morning,  
2 everyone. Let's start with the introductions of  
3 counsel and then I'll have some preliminaries.

4 MR. TIGAN: Good morning, Your  
5 Honor. Jeremy Tigan with Morris Nichols on  
6 behalf of the Plaintiffs, and I'm joined today  
7 by Joe Paunovich from Quinn Emanuel.

8 MR. PAUNOVICH: Good morning, Your  
9 Honor.

10 THE COURT: Good morning.

11 MR. TIGAN: And our client  
12 representative Tiffany Walden.

13 THE COURT: Good morning. And for  
14 the Defendants, Ms. Mowery?

15 MS. MOWERY: Good morning, Your  
16 Honor. Kate Mowery from Richards, Layton &  
17 Finger on behalf of the Defendants. I'm here  
18 with my colleague Fred Cottrell from Richards  
19 Layton and Joe Palys and Katherine Murray from  
20 Paul Hastings.

21 MR. COTTRELL: Good morning, Your  
22 Honor.

23 MR. PALYS: Good morning, Your  
24 Honor.

1 MS. MURRAY: Good morning, Your  
2 Honor.

3 THE COURT: Good morning again.  
4 All right. Our hearing today has been continued  
5 a few times for various good cause, so I was  
6 looking at our previous letter outlining how  
7 we're going to use our time today and I just  
8 wanted to make a couple of tweaks to it in light  
9 of the latest developments. And by the way, I  
10 did receive the materials that were filed on the  
11 11th of December and I have looked at them in  
12 connection with this hearing.

13 I'm going by the letter that was  
14 sent on November 28th. It's Document Item No.  
15 520. With regard to Item No. 2 which related to  
16 argument time allotted for Defendants' renewed  
17 Motion to Stay pending post-grant review, I'm  
18 going to eliminate argument on that today. I  
19 think with that I'll decide it on the papers.

20 I think given the number of  
21 discovery disputes by my count, collectively  
22 there's 13, possibly 14 discrete issues, I think  
23 we're going to need all the time today to  
24 address them pretty much. And I'm certainly

1 keeping on oral argument on Defendants' Motion  
2 to Dismiss the second Amended Complaint. So I  
3 thought given the time that I've set aside, it  
4 makes sense to parse it down to those main  
5 issues and I think I can decide the remaining  
6 stay issue on the papers.

7 With that, let's -- let me ask the  
8 Defendants first, have you discussed with  
9 Plaintiffs' side how you want to present this,  
10 if you want to go forward with the Motion to  
11 Dismiss first and then hold the discovery issues  
12 afterwards or how do you want to use the time?

13 MR. PALYS: Good morning, Your  
14 Honor. We have not had that discussion with  
15 Plaintiffs' counsel, but I think that makes  
16 sense from our perspective, proceed with the  
17 Motion to Dismiss and save the rest for  
18 discovery.

19 THE COURT: All right. Are  
20 Plaintiffs fine with that, Mr. Paunovich?

21 MR. PAUNOVICH: Yes, it's  
22 acceptable.

23 THE COURT: And just so counsel  
24 knows, I'm going to do my very best in light of

1 where we are in the case to give you bench  
2 rulings on the discovery issues. So if we're  
3 going to use our time wisely, let's make sure we  
4 leave a lot of time for those.

5 Again, we've all I think been  
6 around the block on the issues which are  
7 substantive to the Motion to Dismiss. I'm not  
8 suggesting in any way, shape or form that the  
9 curtain has come down and my mind is closed to  
10 it. Obviously, I want to hear oral argument on  
11 it. But in terms of how much I need from all of  
12 you, I really want you to focus on what I'm sure  
13 you can anticipate are going to be the  
14 controversial points that came up in the  
15 briefing, the opening and answering reply  
16 briefs, so those should be your focus.

17 I don't need a recitation of the  
18 law I'm to follow or what cases I'm to follow or  
19 construing the facts in favor of the nonmoving  
20 party. All of that background I think would  
21 save precious time so that we can use it wisely.

22 All right. With that in mind,  
23 let's proceed with the Motion to Dismiss the  
24 Second Amended Complaint.

1 MR. PALYS: Thank you, Your Honor.  
2 I will do my best to focus on what we think are  
3 key issues. Let me begin, and I think this sets  
4 the framework of one of the main arguments that  
5 the Defendants have with respect to this issue.  
6 Olaplex's motion, that's D.I. 126, and I think  
7 we have to make clear what Olaplex presented to  
8 this Court at that time.

9 If we look at D.I. 126, Your  
10 Honor, and I'll quote from them and paraphrase  
11 where I can, at Pages 5 and 6 of that motion  
12 Olaplex made absolutely clear their amendment  
13 will not prejudice L'Oreal because the '954  
14 patent is a continuation of the currently  
15 asserted '419 patent and "the same accused  
16 products are at issue."

17 Again, on Pages 5 to 6, the claim  
18 of infringement is nearly identical to the  
19 claims of the '419 with the sole substantive  
20 difference being that the '954 patent does not  
21 include, remember this term, hair coloring  
22 agent. So they're taking a position and saying  
23 the claims are the same except of this hair  
24 coloring agent, so they're making absolutely no

1 bones about their positions on the '954 and '419  
2 patents.

3 And to be clear on Page 6 of D.I.  
4 126, they begin this argument, Olaplex's  
5 amendment is sought in good faith and for  
6 "legitimate purpose." And what was that  
7 purpose? They explained, Olaplex provided an  
8 element-by-element infringement analysis  
9 detailing L'Oreal's willful infringement of the  
10 currently asserted '419 patent, and they  
11 continue with this and this is telling, Your  
12 Honor. The newly issued '954 patent is  
13 infringed by the same L'Oreal accused products  
14 for the same reasons. Again, same page,  
15 L'Oreal's infringement of the '954 patent is  
16 clear. They refer to the hair coloring agent  
17 and they say here, the issued claims of the '954  
18 do not contain this such limitation and thus,  
19 infringement was essentially admitted.

20 So we think it was absolutely  
21 clear the representations that they came to this  
22 Court to get their motion granted and we believe  
23 the Court relied on those representations when  
24 it granted its motion. So what did Olaplex do



1 in response to this -- and I think that's in the  
2 papers and you can see what our position is on  
3 that. They presented a new amendment that  
4 changed the definition of accused products,  
5 essentially adding new products.

6 They came in first with their  
7 Motion to Amend to say, look, we're going to add  
8 the '954 patent which was just the issue, and  
9 we're going to apply it to the same products,  
10 same positions, and that's not what they did  
11 after the Court granted their motion. I can  
12 skip around, but let me just get to the heart of  
13 this to get to your point.

14 THE COURT: Yes, because I do have  
15 a few questions.

16 MR. PALYS: So the main issue,  
17 some of their argument is, well, you know what,  
18 we filed the infringement contentions later so  
19 no harm, no foul. And then they admit in their  
20 papers, you know what, our pleading really made  
21 clear that we weren't asserting Step 2 and Step  
22 3 against the '419. But really when you read  
23 their pleading, it did to us. But I anticipate  
24 this from Your Honor, what's the prejudice.

1 Look where we are in the case.

2 THE COURT: That's exactly my  
3 question. As a practical matter assuming  
4 hypothetically that this just violates every  
5 rule of procedure that wasn't done through the  
6 vehicle of a proper Motion to Amend giving the  
7 Defendants an opportunity to respond to adding  
8 these products, et cetera, et cetera, as a  
9 practical matter where does that leave the  
10 parties in the schedule that we have now looking  
11 to trial in 2019? Is there a fix?

12 MR. PALYS: Well, we will save  
13 that one for a second.

14 THE COURT: Well, don't tell me if  
15 there's a fix, but I want to hear from the  
16 Defendants.

17 MR. PALYS: Here is the prejudice  
18 with that or the reality that we're in: Had  
19 they came to this Court and actually said what  
20 they intended to do back when they did it, we  
21 would be arguing this issue under a motion to  
22 amend. What would have happened then? Maybe  
23 the Court would have found for us or maybe they  
24 wouldn't, but this issue would have been done.

1 We have not even answered our  
2 Complaint, Your Honor. We are a week away from  
3 the end of discovery. We are not going to get  
4 discovery on our counterclaims. We could have  
5 had that issue taken care of. So, yes, there is  
6 an extreme prejudice against this issue by them  
7 not following the rules and taking it upon  
8 themselves and asking for forgiveness later by  
9 following this and making us file a Motion to  
10 Dismiss on these products. So on that point,  
11 that's where we are.

12 Substantively just to be clear,  
13 and I think the papers are pretty clear, the  
14 pleadings as it stands we think is willfully  
15 deficient on its face on any allegation of any  
16 of these products. If the Court has any  
17 question on that, I'm happy to walk through  
18 that. But we think on its face these products  
19 should not be included in this amendment.

20 Where does that leave us? Again,  
21 we're coming to the close of discovery. We're  
22 going to talk about a lot of discovery issues.  
23 We think it shouldn't be L'Oreal's burden here  
24 or affect L'Oreal. We're not the ones who

1 caused this issue. We're trying to defend  
2 against it and we're the ones being prejudiced  
3 by them not following this procedural rule and  
4 taking it upon themselves to do what they did,  
5 force us to do why we're arguing it today.

6 THE COURT: I know I'm putting you  
7 on the spot and I won't hold you to this  
8 verbatim based on your response, but do you have  
9 a sense of how much discovery you would need to  
10 get your arms around in order for you to be in a  
11 position if these accused products were added  
12 and the Complaint as amended were permitted to  
13 be the operative pleading in the case?

14 MR. PALYS: How much discovery  
15 that we would have to produce?

16 THE COURT: No. You said them  
17 adding these accused products puts you in a  
18 prejudicial spot of not being able to have  
19 discovery with respect to these additions and  
20 also with respect to any counterclaims that may  
21 be asserted.

22 MR. PALYS: I think there's a  
23 miscommunication there, so let me clarify. You  
24 had it right at the end. The prejudice is

1 because they didn't do it earlier let's say in  
2 June, we would have had this rectified whether  
3 win or lose. We would have been able to answer  
4 our Complaint some time maybe in the summer.

5 At that point, we would still have  
6 the time in discovery to pursue discovery on our  
7 claims that we haven't presented yet. Now, to  
8 get to your first point if I understand what  
9 Your Honor is asking, the issue is if Step 2 and  
10 Step 3 accused products from Plaintiffs' side is  
11 added to this case, that's a separate issue.  
12 Now, we're going to have to go through the  
13 process of I'm sure they're going to complain  
14 here today, we didn't get discovery on these  
15 products, et cetera because we've been waiting  
16 on a decision on this issue.

17 There could be deposition topic  
18 issues, are we going to present a witness on  
19 these, preparing them for this stuff. And  
20 honestly, I know we can't get into the substance  
21 because we have many other things to talk about.  
22 The futility argument that we raised on these  
23 Step 2, Step 3 is real. You can see what their  
24 pleading says even though they're trying to run

1 away from it with their infringement  
2 contentions.

3 Step 2 and Step 3 just to be clear  
4 are after follow-on type of products. Step 3  
5 you take home. What are the claims at issue? A  
6 method of bleaching that they're accusing at a  
7 salon. So Step 3 isn't -- I don't know how  
8 they're going to map it to the claim even though  
9 they try to in their infringement contentions,  
10 but in their pleading they don't want to do  
11 that. So I think futility still has to come  
12 into play here.

13 I know that doesn't really get to  
14 your question of what do we do if you do add  
15 these things, and we hope you don't because we  
16 think that's the right decision. But I'm sure  
17 there will be discovery issues that I'm sure  
18 they're going to fight over that we didn't  
19 produce on this.

20 Our main part on prejudice is when  
21 we finally get a chance to tell our side of the  
22 story and start going after potential  
23 counterclaims and we have -- and in fact,  
24 there's been some recent discovery a few days

1       ago with the depositions that really put some  
2       color into this case. We're going to want  
3       discovery on that and frankly, it's cutting off  
4       on the 21st, so there's the prejudice. Any  
5       other questions?

6                   THE COURT: Not on that point, but  
7       go ahead.

8                   MR. PALYS: I can keep going --

9                   THE COURT: The other issue I had  
10      is this whole issue of taking judicial notice in  
11      support of the Motion to Dismiss. Under what  
12      framework, rules, local rules, Federal Rules of  
13      Civil Procedure, case authorities, how does that  
14      get wrapped into what I should consider on a  
15      Motion to Dismiss?

16                  MR. PALYS: The judicial notice  
17      only goes to the Step 1, not Step 2 or Step 3 so  
18      it doesn't have any effect on that. And I'm  
19      happy to talk about it. I think the papers laid  
20      out we're not presenting it as Olaplex is saying  
21      we're presenting it. In fact, and I state this  
22      with caution, Your Honor, I believe this Court  
23      did find a judicial notice on our previous  
24      Motion to Dismiss for a certain issue.

1 I don't know if it's the same  
2 exhibit but I remember reading that. But the  
3 point is, that notice goes to the Step 1 product  
4 and it shouldn't affect Step 2, Step 3.

5 THE COURT: All right. Thank you.  
6 You will have a chance to respond on rebuttal.  
7 Let me hear from the Plaintiff. Mr. Paunovich?

8 MR. PAUNOVICH: Good morning, Your  
9 Honor. Joe Paunovich on behalf of the  
10 Plaintiffs. I think Your Honor got right to the  
11 heart of the point, where is the prejudice here.  
12 And to address it very squarely, I think it was  
13 lost a bit in Defendants' presentation what  
14 additional discovery would need to occur.

15 We believe it's a single  
16 interrogatory response and perhaps one document.  
17 These would be a simple reporting of any  
18 additional financial revenue units, profit costs  
19 that are associated with these products. The  
20 other side actually provided us that information  
21 in their first response to our interrogatory and  
22 after they took the position that, oh, we're  
23 suddenly surprised that these are not part of  
24 the case, they began removing it from their



1 interrogatories responses. So we pushed them  
2 over and over again to continue providing us  
3 that information.

4 If you recall, Your Honor, we had  
5 an August 1 discovery teleconference and Your  
6 Honor instructed us to provide a detailed letter  
7 with specific financial information that we  
8 needed. We did that within a few days of the  
9 hearing and we've been trying our best to try  
10 and resolve this short of a discovery dispute.  
11 It's the very first discovery dispute in our  
12 letter. But to be clear, an interrogatory  
13 response and a document reporting those  
14 financials.

15 We do not need -- they are  
16 identical to the Step 1 product in that they  
17 have the exact same active agent. In fact, they  
18 are sold as a single product as kits. They are  
19 sometimes sold as a stand-alone separate. But  
20 in the majority of the cases -- so this is not a  
21 situation on the amendment. The main issue that  
22 Defendants are raising, this is not an issue  
23 where it would kick discovery out or have any  
24 reason or basis to kick it out.

1                   What it seems to be the Defendants  
2                   are saying is, look, we have these secret  
3                   counterclaims that we refuse to tell anybody.  
4                   We've served an interrogatory asking identify  
5                   all of your defenses months and months ago.  
6                   They refused to provide us with an  
7                   identification of their defenses. Standing  
8                   instead on this long-pending motion saying, we  
9                   will tell you when we tell you after this has  
10                  been identified.

11                  This is not an instance where they  
12                  have been precluded from taking discovery on  
13                  whatever their secret claims might be. So as  
14                  we're doing it and hearing it for the very first  
15                  time here today that we've got these secret  
16                  claims that we want to take discovery on, if  
17                  anything, this seems like a manufactured dispute  
18                  to try and extend our discovery schedule.

19                  Whatever those counterclaims are,  
20                  are totally independent of whether or not Steps  
21                  2 and 3 should be in the case. It's a simple  
22                  financial interrogatory and a document  
23                  associated with it. Once we have those, we're  
24                  good. Our damages people will be set. We don't

1 need any other technical discovery related to  
2 them. We know exactly what they are, their  
3 ingredients and we will be prepared to provide  
4 our expert reports just in the same way that we  
5 provided our infringement contentions on those  
6 products now eight months ago.

7 Unless Your Honor has any  
8 questions, I do think we've laid out all the  
9 other issues in the papers.

10 THE COURT: Why bring it in  
11 through this way? If you were going beyond the  
12 leave that was granted previously with respect  
13 to leave to amend, if there was any chance or  
14 any concern in Plaintiffs' view that this might  
15 be overstepping what the Court admitted, why not  
16 tee it up in the normal fashion?

17 MR. PAUNOVICH: That is a very  
18 good question, Your Honor. And I will candidly  
19 say when we filed our second Amended Complaint  
20 and I will take this personally, I didn't notice  
21 a definition in the very first paragraph  
22 unrelated to the '954 allegations, that second  
23 patent that defined accused products, and it was  
24 just truthfully overlooking that.

1                   The amendment that we made was not  
2                   in the traditional cases where people get their  
3                   Complaints dinged because they've added entirely  
4                   new causes of action or theories or substantive  
5                   matter that is changing the scope of the case.  
6                   At that point everybody knew including L'Oreal,  
7                   that we were accusing all three products. So we  
8                   simply removed the definition so that it was  
9                   consistent with the balance of the Complaint,  
10                  which by the way was already there describing  
11                  and talking about Steps 1, 2 and 3 at length.

12                  These are dozens of paragraphs of  
13                  pages that had talked about all of this. We  
14                  didn't add those. They were in the very first  
15                  Complaint. In addition to answer your question,  
16                  well, why didn't we do something or bring that  
17                  to the Court's attention, our understanding and  
18                  this is part of what we briefed, we don't need  
19                  to identify every single product and every  
20                  single claim that's infringed in a Complaint.  
21                  Under our local rules in the Phillips v. ASUSTek  
22                  case which is in our briefing, it's sufficient  
23                  to identify a single product and single claim  
24                  that's infringing and you have satisfied your

1 duty.

2 Our concern and the very small and  
3 simple clarification was not to later have  
4 L'Oreal say, oh, we didn't know about this. So  
5 that case we do think it seems to be controlling  
6 in the District of Delaware, that the practices,  
7 you identify a product in a claim and then later  
8 you can assert infringement against whatever you  
9 want in the contentions which we did. And I do  
10 apologize, Your Honor. I hate that we even have  
11 to be here having that discussion.

12 At least from our perspective,  
13 there's no doubt that everybody has been on  
14 notice. We were getting discovery before their  
15 motion on those products, taking discovery on  
16 them and we've continued to do so within a  
17 technical nature, et cetera. Our case will be  
18 fully brought in and all we need is just the  
19 financial information. Thank you.

20 THE COURT: Thank you. If you  
21 want to respond, Mr. Palys?

22 MR. PALYS: Yes, thank you, Your  
23 Honor. Real quick. Number one, a mistake  
24 should not prejudice L'Oreal. I think this is

1 going to be a theme you're going to hear  
2 especially when we touch on this protective  
3 order which is a very serious issue for my  
4 client.

5 As to this discovery of the Step  
6 2, Step 3 products, I know I mentioned to Your  
7 Honor, look, we have to pursue discovery on our  
8 counterclaims and then the Step 2 and Step 3 was  
9 them coming for our documents. I forgot to  
10 mention that they have to prove infringement of  
11 Step 2, Step 3 so we're entitled to discovery on  
12 their basis for that.

13 THE COURT: That's what prompted  
14 my question.

15 MR. PALYS: And I apologize for  
16 mixing that up. So, yes, we do have discovery  
17 that we would want on them, how do they operate,  
18 what's their basis for their infringement of  
19 these claims that they're pursuing. What  
20 Mr. Paunovich was suggesting all relate to the  
21 independent claims which have no bearing on  
22 these Step 2, Step 3 products.

23 The third thing I want to bring up  
24 is I heard Olaplex's counsel mention we haven't

1 blocked any discovery on these issues and  
2 discovery has been going on. You're going to  
3 hear today that's actually not the case and I'll  
4 give one example, the precursor before  
5 Ms. Murray gets up here and explains the Behind  
6 the Chair litigation, this is a big issue.  
7 They're refusing to give us documents on that.

8 Why is that relevant? It goes to  
9 a lot of things. At the very least, it relates  
10 to a lot of our defenses that we're going to be  
11 putting against them in terms of how they're  
12 marketing their product. It goes to many of the  
13 issues that Ms. Murray is going to bring up.

14 Now, they're probably going to say  
15 when they get up here because there was a  
16 deposition recently, someone from Behind The  
17 Chair said, oh, it wasn't relevant. That person  
18 doesn't know what's relevant in our case. But  
19 to get to our point, again L'Oreal is being  
20 prejudiced by this and I think, yes, we're  
21 coming close to discovery. And what can we do  
22 about it? Dismiss their claims on these two  
23 products. That's what we can do. We can just  
24 move on and continue on.

1 L'Oreal does not want to extend  
2 the schedule. Let's be clear about this.  
3 Discovery is on the 21st, we're ready to go and  
4 offer our witnesses and provide our disclosures.  
5 Third-party witnesses may be an issue. We have  
6 issues on what they're producing and providing  
7 to us. They just dumped 20,000 documents on us  
8 last week and document production ended a month  
9 ago. That's when we got the full flow of  
10 information. So we're being prejudiced we  
11 believe in our eyes and I know you hear this a  
12 lot. I think the answer here is to dismiss any  
13 notion that the Step 2, Step 3 products come  
14 into this case. Thank you.

15 THE COURT: All right.

16 MR. PAUNOVICH: Your Honor, may I  
17 just say one brief word?

18 THE COURT: One brief word.  
19 Typically, I'm a traditionalist when it comes to  
20 dispositive motions like this and I give the  
21 moving party the last word. But Mr. Palys has  
22 wrapped in some of the discovery issues coming  
23 up, and I think a lot of these issues blend into  
24 different categories so I'm fine giving you



1 further comments. Just know my traditional  
2 practice going forward.

3 MR. PAUNOVICH: Understood, Your  
4 Honor. Ten seconds. Nothing that he just  
5 raised has anything to do with Step 2, Step 3.  
6 I didn't hear any of that.

7 THE COURT: All right. Because  
8 this is a dispositive issue that I'm going to  
9 have to write an R&R on, I will take it under  
10 advisement so I will be writing on this issue.  
11 However, I am ready to speed ahead into the  
12 discovery issues.

13 Let me just reorganize myself on  
14 the bench so that I have materials handy.

15 MR. PALYS: Your Honor, Mr. Palys.  
16 I was just thinking because I know discovery is  
17 going to take us to the rest of the time frame,  
18 do you want to talk about the protective order  
19 now so that it doesn't get lost at the end or do  
20 you want to wait until after the discovery  
21 issues?

22 THE COURT: Well, I was going to  
23 ask the parties. I just presumed that we would  
24 go ahead in the manner in which the issues were

1 raised chronologically in the papers. But if  
2 you want to discuss the most recent briefing  
3 first --

4 MR. PALYS: Well, we're happy to  
5 do what Your Honor wants. It was just a  
6 suggestion.

7 MR. PAUNOVICH: Your Honor, our  
8 preference would be to handle the discovery  
9 given the length of the issues, but of course,  
10 we will defer to your preference.

11 THE COURT: Okay. Well, let's go  
12 in the order that they were raised. Does  
13 anybody have a PowerPoint on the discovery or  
14 are we just going to go issue by issue as if we  
15 were on a teleconference?

16 MS. MURRAY: No, Your Honor, we  
17 don't have any slides. I don't know if Your  
18 Honor wants to go through as they were presented  
19 in the respective letters or --

20 THE COURT: We'll do it in the  
21 fashion that we've been doing it in our  
22 teleconferences. We'll go issue by issue. I  
23 have the first submission that was filed by your  
24 client, Ms. Murray, the Defendant Document Item

1 No. 525, and the first issue raised in that  
2 document is the Behind The Chair documents, so  
3 why don't we start with that one.

4 MS. MURRAY: Yes, Your Honor.  
5 Following the August conference, the Court  
6 ordered Olaplex to produce relevant documents  
7 from the Behind The Chair litigation. They did  
8 produce some of those documents, but it became  
9 very clear that not all of them have been  
10 produced.

11 There are deposition transcripts  
12 that they will not give us complete copies of  
13 there are declarations that they have not  
14 produced. Frankly, Your Honor, we don't  
15 necessarily have visibility into everything  
16 that's missing because we weren't involved in  
17 that litigation. But just from the minimal  
18 documents that we've seen, we know that we don't  
19 have complete sets.

20 Olaplex said, you're not getting  
21 anything else. We've given you what we think is  
22 relevant. We asked for documents from Behind  
23 The Chair. They first said, all right,  
24 everything that you guys want was exchanged

1 between the parties during that litigation. We  
2 have a warehouse at our counsel's office. Let  
3 me figure out the best way to get it to you.

4 When I'm waiting for that phone  
5 call back, I get a call from -- and this is  
6 someone from Behind The Chair. I get a phone  
7 call from an attorney now representing Behind  
8 The Chair saying, we've spoken to Olaplex.  
9 They're going to give you everything, get it  
10 from them. So fine, we understand. We don't  
11 want to bother third parties if the parties have  
12 the information.

13 So we're waiting for Olaplex. He  
14 said, my understanding is Olaplex is going to  
15 produce a large volume of documents to you, so  
16 you get it from them. I wait for the documents.  
17 Olaplex produces the settlement agreement  
18 between Behind The Chair and Olaplex, which we  
19 did ask for so they gave us that. They didn't  
20 give us anything else.

21 I go to back to Behind The Chair  
22 and say, unfortunately, we didn't get that big  
23 volume of documents that we had requested. He  
24 says, well, we can give you what Behind The

1 Chair produced but we can't give you anything  
2 that Olaplex produced. We can't give you any  
3 testimony from people such as Dr. Hawker and  
4 Dr. Pressly who are the inventors of the patents  
5 asserted in this case because Olaplex has asked  
6 for all of that back. We don't have it anymore.

7 So now, I'm going back to Olaplex,  
8 can we please have these documents? And they  
9 said, nope, we're not giving you anything else.  
10 So that's where we are. Why is it relevant --

11 THE COURT: Well, let me stop you  
12 there if you don't mind. It's my understanding,  
13 and I think Mr. Palys referenced it briefly in  
14 connection with the Motion to Dismiss, that  
15 there was a recent large volume of documents  
16 produced and it's mentioned in the papers too by  
17 Plaintiffs, that there was a large document  
18 production I want to say on December 3rd  
19 perhaps.

20 MS. MURRAY: Yes.

21 THE COURT: Does that contain any  
22 of the documents that you're looking for or have  
23 you not had an opportunity to go through all of  
24 that yet?

1 MS. MURRAY: We have gone through  
2 it as quickly as we can and have not seen those  
3 in there, and our understanding from Olaplex is  
4 when we had these calls on November, so prior to  
5 this last dump is that they are not giving us  
6 more Behind The Chair documents. We haven't  
7 seen those in the 20,000 pages that have been  
8 dumped on us. So their position is it's nothing  
9 else that's relevant and you get what you get  
10 and that's it.

11 THE COURT: When we had this issue  
12 come up back in August, I indicated that I was  
13 not a fan of just saying in a very general  
14 unstructured or blanket way that I would grant a  
15 blanket unlimited production of documents, that  
16 I wanted you to fine-tune specifically the list  
17 of documents that you would like produced from  
18 that California litigation. And one of them  
19 certainly was the settlement agreement which you  
20 have.

21 But how am I to cabin this in  
22 terms of management of discovery? We all know  
23 just the volumes and volumes of things that are  
24 produced in a large complex, commercial

1 litigation and not all of them are necessary or  
2 become relevant, so to speak.

3 I guess tangentially they may all  
4 be relevant, but proportionally you don't need  
5 all of them to utilize here in this litigation.  
6 So how do we draw those parameters?

7 MS. MURRAY: Sure. I think we are  
8 at a slight disadvantage because we don't know  
9 what's been --

10 THE COURT: Understood. But you  
11 know what you're looking for and you know what  
12 would be helpful.

13 MS. MURRAY: We know from a recent  
14 deposition of one of the Behind the Chair  
15 principals that there were a lot of depositions  
16 taken in that case, so we would like the  
17 complete depositions with exhibits because we  
18 don't have that of Mr. Christal, Drs. Hawker and  
19 Pressly. They've given us some snippets. They  
20 haven't given us complete testimony or the  
21 exhibits, so all of those transcripts. Any  
22 transcript of an Olaplex witness.

23 We understand from the recent  
24 depositions that there were depositions of

1 Behind The Chair that celebrity stylists were  
2 also deposed. We want those transcripts. This  
3 goes to prior use in our case about the Olaplex  
4 product, documents relating to the ownership of  
5 the company.

6 We are aware of documents, Your  
7 Honor, that were produced in another litigation  
8 abroad by Olaplex relating to the ownership of  
9 the company that have not been produced to us in  
10 this litigation. We don't know why that is. So  
11 those have not been produced.

12 THE COURT: And when you say a  
13 company, it's of Olaplex?

14 MS. MURRAY: Yes, of Olaplex. It  
15 can go to inventorship. And then we're still  
16 working through a secret counterclaim but we're  
17 working through it, and there are issues  
18 relating to the way that Olaplex, not just the  
19 counterclaim but even in this particular case,  
20 the way that Olaplex manipulated the market, the  
21 market that they relied on to seek a preliminary  
22 injunction, who was posting things and who was  
23 saying things about their product and were they  
24 being paid to say things about their product,



1 and that was the underlying whole purpose of the  
2 Behind The Chair litigation.

3 The allegations were that Olaplex  
4 was paying Behind The Chair to promote their  
5 products in exchange to give Behind The Chair a  
6 portion of the company. And when Olaplex failed  
7 to live up to its portion of the deal as alleged  
8 in that case, Behind The Chair sued.

9 So all of these promotions that  
10 Behind The Chair and other stylists are doing on  
11 behalf of Olaplex and creating this market for  
12 Olaplex, was that all paid by Olaplex. So we  
13 would want documents showing those  
14 communications between Olaplex and anybody who  
15 has marketed the products for Olaplex.

16 Were they given a cut of the  
17 company, were they given something else to  
18 market the product. It goes to the market as an  
19 issue in this case. They're seeking and the  
20 Court has recommended an injunction to block  
21 L'Oreal's products based on the analysis of the  
22 market, so we're looking for those types of  
23 documents.

24 Basically deposition transcripts

1 of anybody related to Olaplex and marketing of  
2 their products, to any ownership of the company,  
3 and communications, any contracts, any  
4 agreements regarding who was making reviews or  
5 advertisement about Olaplex in this market.

6 The other thing that would come  
7 into play here, Your Honor, because we don't  
8 know who owns this company, it's been very  
9 secretive and they won't reveal the information,  
10 the value of the company. Who gets a cut, how  
11 much is it.

12 We understand now from the Behind  
13 The Chair litigation that the settlement did not  
14 include giving Behind The Chair a portion of the  
15 company. They were just paid out a lot of money  
16 in exchange for settlement of that case. That's  
17 fine. Who else is out there? We found that one  
18 out and we had to dig around to find out about  
19 that one. But what else is there?

20 Like I said, there's documents  
21 showing ownership by other people that have not  
22 been produced in this litigation. They have  
23 been produced in other matters and we found them  
24 publicly, but we still need documents regarding

1 ownership. And I'm sure that came up in the  
2 Behind The Chair litigation and we would like  
3 those documents.

4 They have the documents. It was  
5 told to us by counsel for Behind The Chair that  
6 Olaplex had asked for all of this back, so they  
7 should be able to give whatever they've asked  
8 back from Behind The Chair to prevent Behind The  
9 Chair from giving it to us. They should be able  
10 to grab that and just give it to us.

11 THE COURT: Anything further  
12 before I hear from --

13 MS. MURRAY: Not further on Behind  
14 The Chair.

15 THE COURT: Okay. I will do issue  
16 by issue, so I will hear from the Plaintiffs  
17 with respect to this.

18 MR. PAUNOVICH: Thank you, Your  
19 Honor. The important lens to look at this issue  
20 through is the common one for discovery, is the  
21 discovery being sought relevant to any claim or  
22 defense being asserted in the matter. The BTC  
23 litigation concerned a contract dispute between  
24 Olaplex and a third party. It's been fully

1 resolved with them not owning any of the company  
2 Olaplex, much less its IP.

3 There's literally nothing from  
4 that litigation that is relevant to a claim or  
5 defense in this case. What's more, counsel may  
6 not know this or may have misrepresented, but we  
7 have produced a capitalization table. We've  
8 provided them with a full ownership, shares,  
9 information, percentages about our company.  
10 They are deposing each of those people.

11 We are also mistaking -- and this  
12 is very critical. The thread of what they are  
13 saying of how this is supposedly relevant to  
14 this case tunes back to their standing argument  
15 essentially. They say, well, it's relevant to  
16 inventorship. Ownership of a company and  
17 inventorship are two very different things as  
18 I'm sure Your Honor is aware of.

19 If you don't conceive of an  
20 invention, you're not an inventor. You could  
21 own a company that owns that patent and not be  
22 an inventor of it. This is the definition of a  
23 wild fishing expedition where they have asked  
24 for a production of countless documents simply

1 for reasons that have no relationship to the  
2 claims or defenses in this case.

3 We did submit the other day, Your  
4 Honor, Docket Entry 569. You can see  
5 Mr. Zehil's testimony. He is an owner and  
6 consultant and former lawyer for BTC, and he was  
7 very unequivocal, nothing in that dispute, no  
8 documents, no testimony, straight from him and  
9 this was not on our cross, on their examination  
10 of him, had nothing to do with patents.

11 He says, well, I knew there were  
12 patents. I didn't do any due diligence. We  
13 learned that they were owned by Liqwd. That's  
14 all I got. There's simply nothing relating to  
15 that that's relevant. The only other remaining  
16 issue I would raise unless Your Honor has  
17 questions, they said, well, there's a lot of  
18 things here about the market, how we've marketed  
19 our products.

20 The only finding in this case  
21 relating to market is that it's us and them in  
22 the market. That's it. How we advertise our  
23 products doesn't have anything to do with that  
24 foundational finding --

1 THE COURT: Well, you have to  
2 admit they have a point. There was as alleged,  
3 and I'm not saying these facts are true but I'm  
4 going by allegations, that there was some type  
5 of transaction, relationship payment or  
6 consideration given to Behind The Chair to  
7 promote Olaplex's products and that promotion  
8 was successful and translates to valuations and  
9 hence, damages issues in this case and there is  
10 a connection, a nexus.

11 MR. PAUNOVICH: Respectfully, Your  
12 Honor, I'm not sure I see it. Mr. Zehil,  
13 although we didn't submit this piece of  
14 testimony because it wasn't raised as part of  
15 the BTC dispute and in terms of how the issues  
16 were teed up in the letters, he also testified  
17 at his deposition that BTC was never paid for  
18 doing the promotional activities, and that's  
19 true. That was the nature of the dispute  
20 between the parties.

21 They said, oh, we have an  
22 agreement, and we said, no, we don't have an  
23 agreement. The parties had a lawsuit. It  
24 lasted a couple of years as they resolved the

1 lawsuit. There's never been no check, no dollar  
2 has ever been exchanged in connection with that  
3 lawsuit for promotional activities.

4 BTC and Olaplex has a  
5 going-forward relationship for providing  
6 promotional activities and we've provided  
7 them that. It's attached to the settlement  
8 agreement. There's a normal schedule of  
9 promotional activities that any customer  
10 including Olaplex can purchase at the rack rate,  
11 and we have agreed with them.

12 We've entered into a contract  
13 essentially through this settlement agreement to  
14 purchase promotional activities looking forward  
15 from the settlement of that suit in December of  
16 last year. We haven't tried to deny discovery  
17 on that. They've taken discovery on that.  
18 They've deposed Mr. Zehil for three hours.

19 We're just not seeing how any of  
20 that warrants this wide-ranging fishing  
21 expedition to say, hey, back up a truck as  
22 counsel said and just get everything together  
23 and give it over to us. These issues were not  
24 germane to the claims or defenses in this case.

1 And whatever tangential relevance the marketing  
2 may have, we've provided -- the only payments  
3 that we've made and that's new are laid out in  
4 the settlement agreement which we've provided.

5 The last thing I will say, Your  
6 Honor, is also it's inaccurate as Defense said  
7 that we only produced that one document. After  
8 the August hearing, we went back in good faith  
9 as Your Honor asked us to do to look at all of  
10 the things that they had specifically  
11 identified.

12 We produced about 170 documents in  
13 addition to the settlement agreement. So there  
14 were declarations, pleadings, marketing  
15 materials, the things that they say we paid for  
16 which we didn't and were the subject of the  
17 litigation. We've produced all of those things,  
18 a letter that they had sent and some Facebook  
19 posts, things of that nature.

20 And BTC has also represented that  
21 every single post, promotional activity, et  
22 cetera, that they did for Olaplex is still  
23 publicly available on the Internet on their  
24 website. So what are we doing here? We're



1 going to go back and relitigate a prior  
2 litigation that's been resolved with a third  
3 party looking through hundreds of exhibits, this  
4 and that. We don't just don't see it.

5 Respectfully, Your Honor, we think  
6 between the 170-plus documents we've produced,  
7 the fact that they're getting the discovery into  
8 this ongoing marketing relationship and the fact  
9 that I think it's notable that they've had  
10 200,000 pages produced to them, a half dozen of  
11 depositions, we don't see a single document or a  
12 single piece of testimony from anything that BTC  
13 gave them highlighted or cited demonstrating the  
14 relevance. We just have attorney argument here  
15 today as to why all of this is needed. So  
16 unless Your Honor has any other questions?

17 THE COURT: Yes, I have a few  
18 questions. The docket listings themselves from  
19 that case, has that been produced?

20 MR. PAUNOVICH: The D.I. Nos.?

21 THE COURT: Yes, exactly.

22 MR. PAUNOVICH: Everyone can  
23 access that on the court --

24 THE COURT: That was my question

1 because I've been out of the loop and I no  
2 longer have my access even to the Delaware state  
3 court and I'm just wondering how accessible that  
4 is.

5 MR. PAUNOVICH: The docket is  
6 accessible. Certain items are filed under seal  
7 of course, some are not. But you can see the  
8 titles of them. And for the items they said,  
9 don't look at this and what about this, and we  
10 did that after the last August hearing. We went  
11 back. That was part of what led to our  
12 production of 170 or so documents including  
13 declarations and what have you that are actually  
14 legitimately relevant to the case.

15 THE COURT: For any of the  
16 witnesses that testified in the Behind The Chair  
17 litigation that could be potentially testifying  
18 in this trial, have all deposition transcripts  
19 with exhibits been produced to L'Oreal?

20 MR. PAUNOVICH: No. So there are  
21 certain witness that have already been deposed  
22 or may be deposed again in this case that those  
23 deposition transcripts have not been produced.  
24 Again, I would just point out, for example, they

1 say, well, it's all about ownership. We've  
2 provided the capitalization table.

3 There's nothing different in terms  
4 of D. Christal, X. Pressly gets X. Craig  
5 Hawker gets X. The sort of information that a  
6 party would traditionally want to say to show  
7 bias and say, well, this guy or gal has some  
8 incentive here and, therefore, we're going to  
9 call into question their credibility, so they  
10 have all of that.

11 They're going to be able to  
12 examine these people. There's no mystery,  
13 nothing's being hidden about they get paid a  
14 bunch of money. They came up with a great  
15 invention and have a successful company and  
16 they're going to be able to examine them on  
17 that.

18 THE COURT: And you've referred a  
19 few times to this capitalization table and/or  
20 related documents that discuss ownership. Do  
21 you happen to know to guide the other side at  
22 what Bates Nos. in the production this appears  
23 or can you provide --

24 MR. PAUNOVICH: I can have it

1 before the end of the hearing. I believe  
2 Ms. Murray and her colleague had discussed it  
3 with my colleague and we had informed them that  
4 we were going to produce that, so I will get the  
5 Bates No. and give that to you to guide them.

6 THE COURT: Okay. And all  
7 exhibits and attachments to the settlement  
8 agreement have been provided when the settlement  
9 agreement of the Behind The Chair litigation was  
10 produced; is that accurate?

11 MR. PAUNOVICH: My copy that I  
12 have, I was looking through it and I'm missing  
13 Exhibit 1 I think it is. If that was the way it  
14 was produced, that was a mistake. So I will  
15 make sure that we get that to the extent that it  
16 is missing. Our intention was to be fulsome and  
17 give them all of that.

18 We're not trying to hide anything  
19 regarding -- I believe we think the settlement  
20 agreement obviates these issues.

21 THE COURT: Okay. Thank you.  
22 That's all of the questions I have.

23 Ms. Murray?

24 MS. MURRAY: Just real quick, Your

1 Honor, on that. The Behind The Chair litigation  
2 was in Los Angeles County Superior Court. We  
3 are finally going electronic in files, but it's  
4 not there yet so you cannot see everything from  
5 the case on the docket. You can see documents  
6 that were filed. You can't access any  
7 documents.

8 THE COURT: I understand that.  
9 Does it --

10 MS. MURRAY: It's not like Pacer  
11 so certain things are there if they are posted  
12 by the clerk. Discovery applies -- unlike  
13 Delaware where you have to post notice of  
14 service, that doesn't exist in Los Angeles  
15 Superior Court. So we don't know what discovery  
16 was served, what subpoenas were issued.

17 None of that goes on the docket in  
18 that court so we only have visibility as to  
19 basically the pleadings like motion for summary  
20 judgment, things like that and the name of the  
21 document and that's it, which is why we would  
22 love to get a list so that we can look through  
23 it because that only gets us so far.

24 THE COURT: Okay.

1 MS. MURRAY: Just a few points of  
2 clarification, Your Honor. Mr. Paunovich said  
3 that Olaplex never paid for the promotion.  
4 Well, that was the point of the litigation.  
5 That's why Behind The Chair had to sue them  
6 because they promised to pay and they didn't.  
7 And Olaplex paid millions and millions of  
8 dollars in settlement as a result of that  
9 alleged agreement.

10 And in exchange for that  
11 settlement, Behind The Chair is agreeing to  
12 continue to promote Olaplex. It's highly  
13 relevant. And like we said, it's not just  
14 Behind The Chair. It could be other matters  
15 there that are implicated.

16 When Mr. Paunovich said that they  
17 produced more documents, I was referring to the  
18 one page, Your Honor. After I spoke to Behind  
19 The Chair's counsel, he said to me, Olaplex is  
20 going to give you a large volume of documents,  
21 don't bother us. And that's when I only got the  
22 one page. We did get those documents that he  
23 was referring to back in August but this is much  
24 later when we got the one page.

1 They have the documents, Your  
2 Honor. We don't understand the burden on why  
3 they can't give us the documents. Mr. Paunovich  
4 is trying to explain how they're going to use  
5 deposition testimony in our case. We have the  
6 right to see these depositions, especially  
7 people who they may depose in this case.

8 Why can't they give us the  
9 deposition transcripts? I don't think he needs  
10 to tell us how we're going to use deposition  
11 testimony for the litigation. It's not just  
12 about ownership. It also goes to the market.  
13 It goes to damages. We just want these  
14 documents that they clearly have and for  
15 whatever reason, they just don't want us to see  
16 them. That's all I have unless you have  
17 questions, Your Honor?

18 THE COURT: No further questions.  
19 I just have one question and you can remain  
20 seated, Mr. Paunovich.

21 Do you have access to the docket  
22 in a more detailed form than Ms. Murray  
23 described or is the way the docket appears is  
24 the way it appears for everybody, that not every

1 notice of service or notice of service of  
2 deposition or deposition subpoena is on the  
3 docket? Does Plaintiffs have a more  
4 comprehensive document?

5 MR. PAUNOVICH: If we do, we will  
6 be more than happy to provide that. It may  
7 provide some clarity for them to ask for  
8 specific additional documents. I do think it's  
9 accurate some courts have a practice of saying  
10 notice of service such-and-such discovery, it  
11 depends I believe within L.A. Superior Courts,  
12 which court it is.

13 And truthfully, we ended up  
14 handling that case but only right before trial  
15 so we'll provide whatever form of docket we  
16 have. I do believe with regard to electronic  
17 filing, L.A. Superior Courts are very behind in  
18 terms of that. You can simply send a runner  
19 which is about a quarter mile from Paul Hastings  
20 L.A. office where counsel is located to get  
21 these same things, but we're happy to do that as  
22 well.

23 THE COURT: Anything further,  
24 Ms. Murray?



1 MS. MURRAY: No, Your Honor.

2 THE COURT: You may be seated. I  
3 will address this issue and then move on to the  
4 next issue.

5 I'm going to grant it in part and  
6 deny it in part because again, as I said back in  
7 August I'm just not a fan of a blanket order  
8 saying get everything and produce everything  
9 from another litigation that might have some  
10 connections however great or slim to the issues  
11 being litigated in this case.

12 I'm a fan of decision-targeted  
13 detailed requests for what a party is looking  
14 for. I think the first step is to get docket  
15 entries over to the L'Oreal counsel and a  
16 comprehensive listing of the docket entries from  
17 that California litigation as possible. Even if  
18 that means as you say, Mr. Paunovich, sending  
19 out one of your runners to the court to use  
20 old-fashioned photocopy machines to photocopy,  
21 whether they're handwritten, typed, however  
22 they're kept over in L.A. Superior Court;  
23 because the listing of docket entries will give  
24 us some kind of a road map to what may be out

1 there and it may be interesting to L'Oreal if  
2 they had made an argument that it's relevant and  
3 proportional to the needs of this case.

4 I would ask that you do that if  
5 you can by the end of this week. If there's any  
6 impediments to that, just work it out with the  
7 other side, but my point is do it quickly.

8 MR. PAUNOVICH: Will do, Your  
9 Honor.

10 THE COURT: The other relief I  
11 will grant is I think it's fair game that any  
12 witness who has been identified in discovery in  
13 this case who will potentially be testifying at  
14 trial and who was also a witness that gave  
15 deposition testimony in the Behind The Chair  
16 litigation, I think it's only fair that those  
17 transcripts and exhibits to those transcripts be  
18 produced to L'Oreal.

19 And then also, I will clarify  
20 whether or not the settlement agreement that was  
21 previously produced to L'Oreal is missing, the  
22 exhibits, and make sure that they have all of  
23 the exhibits appended to that.

24 I'm assuming that these

1 transcripts and exhibits are within your  
2 possession currently and wouldn't take a  
3 considerable amount of time to produce them to  
4 the other side, but I always ask in these  
5 hearings what is a reasonable time frame for you  
6 that you will produce those to L'Oreal?

7 MR. PAUNOVICH: I need to check  
8 with my team, but we'll do it as expeditiously  
9 as possible, also recognizing they have some  
10 depositions of these witnesses coming up next  
11 week, so I will endeavor to have it done by the  
12 same deadline as Friday.

13 THE COURT: Why don't we make it  
14 as the same deadline as the docket entries. And  
15 again, if there are any impediments that you  
16 foresee, talk to opposing counsel and work that  
17 out, because again the idea is to be as prompt  
18 as possible. And then I haven't heard much of a  
19 different spin from Plaintiffs on the way that  
20 L'Oreal has spun the litigation in Behind The  
21 Chair in terms of what the core litigation was  
22 about, alleged failure to comply with the  
23 contract obligations to properly and effectively  
24 promote Olaplex's products.

1 I'm not saying that that's a  
2 finding of fact. But for purposes of this  
3 discovery motion, I'm trying to get a feel or  
4 summary around what the gist of that litigation  
5 was. And if that is the case and it does center  
6 around an agreement to promote Olaplex's  
7 products, then I agree with L'Oreal that there  
8 may be some connection between those promotional  
9 efforts that may have some relevance to some of  
10 the issues being litigated in this case.

11 I will order that any contracts or  
12 documents memorializing any promotional  
13 agreements that were the subject matter of that  
14 litigation in the Behind The Chair and any  
15 agreements or documents memorializing money,  
16 cash or any type of consideration paid in  
17 connection with those promotional efforts, they  
18 be produced to L'Oreal as well. And again, the  
19 sooner, the better.

20 I don't know what, if anything,  
21 exists. I don't know how this agreement was  
22 formulated, but I've got to think if this was a  
23 commercial contract dispute to the extent those  
24 contracts have not been produced, it would be

1 helpful to produce them so that L'Oreal can  
2 figure out what the parties were fighting over,  
3 what material contract terms and alleged breach  
4 or whatever was being fought over in that case.  
5 So I would ask that they be produced.

6 Again, I will put the same  
7 deadline on all of this since at least according  
8 to Ms. Murray's representations from her  
9 conversation with counsel for Behind The Chair  
10 that apparently all of this is presently in  
11 Olaplex's possession. If it is and that's  
12 accurate, then these productions of materials  
13 that are already produced in a California  
14 litigation shouldn't be too difficult to  
15 promptly access and produce to L'Oreal at this  
16 time.

17 MR. PAUNOVICH: Your Honor, may I  
18 ask for a clarification?

19 THE COURT: Sure.

20 MR. PAUNOVICH: The nature of the  
21 dispute was an oral contract. There was never a  
22 signed agreement other than the settlement  
23 agreement that we produced. I'm just worried  
24 that there may be -- what the scope of Your

1 Honor's order because essentially, parties had a  
2 bunch of conversations and there were some  
3 negotiations, but never a signed agreement.  
4 That was the whole nature of this allegedly oral  
5 contract, never consummated so they litigated  
6 and decided, you know what, payments -- the  
7 settlement was not for anything done in the  
8 past. Either it was for an agreement to go  
9 forward and settle their disputes in the classic  
10 way that litigations are settled, to take risk  
11 up off the table, et cetera. So I just wanted  
12 to understand the scope of your order as far as  
13 that is concerned.

14 THE COURT: I'm going to keep that  
15 in my order. And the way to deal with that if  
16 there are no documents that can be produced in  
17 response to what I'm ordering, then I would set  
18 forth in writing to L'Oreal. And to the extent  
19 as they pull through deposition transcripts and  
20 exhibits, if L'Oreal continues to feel that  
21 there are documents of any variety that relate  
22 to this promotional relationship between the  
23 parties that L'Oreal can make an argument  
24 relevant and proportional to the needs of the

1 case, it will be without prejudice to L'Oreal to  
2 raise the issue again.

3 MR. PAUNOVICH: Thank you, Your  
4 Honor.

5 MS. MURRAY: Your Honor, can I  
6 respond?

7 THE COURT: Yes.

8 MS. MURRAY: Your Honor, we did  
9 receive Behind The Chair's production and we  
10 have not seen like Mr. Paunovich said a formal  
11 contract, but there were drafts and there were  
12 emails and the big dispute was what was the  
13 contract. And we know that an oral contract in  
14 certain situations can be a contract and we know  
15 that writings and emails can also constitute a  
16 form of an agreement, so there have been emails  
17 but we've only seen one side of it, not  
18 Olaplex's production side.

19 So to the extent that emails can  
20 form the parts of the contract of what the  
21 parties believe they may have agreed to, we  
22 think we should have access to those.

23 THE COURT: Perhaps if you haven't  
24 already, you should share a sampling of those

1 types of documents with Olaplex's counsel and my  
2 order encompasses -- it's not just one-sided.  
3 It's any documents going either way from Olaplex  
4 to Behind The Chair and from Behind The Chair to  
5 Olaplex. And to the extent Olaplex is in the  
6 possession of documents that are part and parcel  
7 to that, that's what I'm ordering to be  
8 produced, documents, emails, letters, whatever  
9 it is in documentary form that relates to this  
10 oral agreement for promotional purposes that was  
11 at the center of that litigation and that's why  
12 I'm ordering it produced. And that is all I'm  
13 going to order produced from Behind The Chair.

14 As I said, when you get the docket  
15 entries if you feel that there's more to ask  
16 for, it would not be a given. You will still  
17 have to make your case and meet your burden that  
18 it's relevant and proportional under Rule 26,  
19 but I'll give L'Oreal an opportunity to ask for  
20 anything additional from Behind The Chair.

21 I think I would ask that the  
22 parties meet and confer in good faith and there  
23 not be any attempts to hide the ball, so to  
24 speak. Let's get this issue resolved.



1 Discovery has to move along.

2 I find that we spend a lot of time  
3 sometimes retreading ground that I thought was  
4 concluded or had some closure to it, so I'd like  
5 this to be one of those issues for purposes of  
6 our discovery conferences that has closure to  
7 it.

8 MR. TIGAN: Your Honor, may I  
9 approach?

10 THE COURT: Yes, you may,  
11 Mr. Tigan.

12 MR. TIGAN: I have one suggestion.  
13 I know in the past in some of these hearings  
14 when both parties have moved on discovery  
15 disputes you've had one side select their most  
16 important and then the other side and back and  
17 forth. If Your Honor is agreeable to that,  
18 maybe we can proceed that way for the remainder  
19 of the hearing.

20 THE COURT: I do want to address  
21 all of them because I'm not sure if I will get  
22 an opportunity to have them carry over. I'm not  
23 opposed to going in that fashion. So in light  
24 of that, do you want to pick an issue from

1 Olaplex's point of view and then we'll hear that  
2 and then we will get back to L'Oreal?

3 MR. TIGAN: Yes, Your Honor.  
4 Thank you. I will let Mr. Paunovich select our  
5 most important issue.

6 THE COURT: Okay.

7 MR. PAUNOVICH: Your Honor, it  
8 will be the first topic raised in our dispute  
9 letter which relates to financials and licensing  
10 documents.

11 THE COURT: All right.

12 MR. PAUNOVICH: There are  
13 essentially four types of documents that we  
14 raised or responses to interrogatories that we  
15 raised in this section falling under financials  
16 and licensing. The first is one that you've  
17 already heard some discussion on. We just want  
18 an interrogatory response and we're assuming it  
19 will be a single document or two documents  
20 relating to the financials of Step 2 and 3  
21 products.

22 That would be sufficient for those  
23 to put us in a position to assess, evaluate,  
24 provide expert reports on the damages relating

1 to those products. The second category within  
2 this subject was the licensing documents. We  
3 have served both in an interrogatory as well as  
4 a document request asking them to produce  
5 licenses within the hair care space. We've had  
6 much discussion regarding this and we've had no  
7 licenses produced to us.

8 There's a range of potential  
9 damages that we may seek in this case and  
10 licenses will be clearly relevant to part of  
11 that analysis under Georgia Pacific.

12 THE COURT: Hair care products is  
13 an awfully broad category. In your discovery if  
14 you want to point me to a specific request, what  
15 specific licensing documents -- how would you  
16 further refine that request?

17 MR. PAUNOVICH: So we had asked  
18 for inbound or outbound licenses. We've asked  
19 for any and then at meet-and-confers, we said it  
20 should be hair care space. And as we understood  
21 it, I'm not sure if I'm describing it correctly  
22 but I think it may be five divisions that  
23 L'Oreal has. One of which was just general  
24 consumer products, cosmetics and things that

1 would be applied to the face.

2 We said, okay, you don't have to  
3 give us those. We are looking for things that  
4 relate to legitimate hair care. It can't be  
5 something narrow to say bond builder, for  
6 example, in this case because otherwise we're  
7 not going to see anything, but products that  
8 relate to the treatment of hair, chemical  
9 treatment. Any other sort of hair care products  
10 that -- for lack of a better way to put it,  
11 products get put on your hair in a bleaching  
12 formulation --

13 THE COURT: Are you looking for  
14 shampoo products, hair spray products? How  
15 broad is this category?

16 MR. PAUNOVICH: I do think those  
17 are within the potential realm of comparability.  
18 Experts, as I'm sure they will do, will have to  
19 assess under the Georgia Pacific factors the  
20 relative closeness or comparability of those  
21 licenses and they have to adjust up or down, but  
22 I think that they are within the scope of the  
23 types of licenses that will be relevant to a  
24 damages analysis.

1 We're not asking for lipsticks,  
2 blushes, other types of products. L'Oreal is a  
3 very big company. We didn't say, back up the  
4 truck. We're looking for those types that could  
5 be within the realm of comparability under  
6 Georgia Pacific.

7 The third type of document in this  
8 category was the profit and cost information.  
9 We had agreed or I thought we had agreed in  
10 discussions between the parties to produce  
11 actual Excel spreadsheets with the raw data so  
12 the parties could assess what that is. L'Oreal  
13 has provided us with an interrogatory response  
14 that seems very much abstracted.

15 We had agreed and produced this  
16 financial information to them so we were looking  
17 for that. And the last piece under the  
18 financials is a pretty new one under our Supreme  
19 Court's precedent and Delaware precedent, but  
20 we're looking for their worldwide sales data.

21 This is a really important one  
22 because we think that there's a significant  
23 portion of financials that's being hidden. We  
24 have had representations from counsel saying

1 that they only manufacture and sell products  
2 here in the U.S. But then we look at those  
3 products and they indicate that they're  
4 manufactured in Spain or perhaps other places  
5 and they have on their labels multiple languages  
6 strongly suggesting that these are ending up  
7 somewhere outside the U.S. So we've asked for  
8 the worldwide sales information and information  
9 relating to their manufacturing and  
10 distribution.

11 They refused to produce all of  
12 that. Under the WesternGeco and Power  
13 Integrations case from Judge Stark, we do think  
14 it's relevant.

15 THE COURT: Yes. But do those  
16 cases address method patents? Aren't these  
17 method patents?

18 MR. PAUNOVICH: They are method  
19 patents and I do think that they're squarely on  
20 point. Both WesternGeco and Power Integrations  
21 didn't make a distinction between apparatus and  
22 method claims. I think it's very much akin to  
23 the analysis that was done in WesternGeco where  
24 you've got a component in an apparatus claim and

1 we'll say, and I'm shipping it abroad and we  
2 combine it and then, voilà, you infringe.

3 They sell a component. If they're  
4 shipping it abroad or manufacturing it,  
5 distributing it abroad through affiliates or  
6 something of that nature, then it gets combined  
7 with a bleaching formulation and applied to the  
8 hair. It's essentially the same thing. We have  
9 a direct infringement abroad where they are  
10 manufacturing a component of that infringing  
11 method that's ultimately performed abroad.

12 Those are the four categories  
13 under the financial information, licensing  
14 information. If Your Honor has any questions,  
15 I'm happy to answer them.

16 THE COURT: Not at this time. All  
17 right. Let me hear from L'Oreal. Ms. Murray?

18 MS. MURRAY: I believe that  
19 Mr. Paunovich combined several different  
20 requests so I will just follow his order. The  
21 financials, we have given financials for any  
22 Step 2 or Step 3 product that is sold along with  
23 a Step 1. So a lot of the times these products  
24 are sold in kits. If there's a kit that has a 1

1 and a 2 or a 1 and a 3, they have sales of those  
2 products. We have provided that data.

3 In addition, the last set of data  
4 that we've provided we've included additional  
5 kits that we've located that also include a Step  
6 2 combined with the 1 or a Step 3 combined with  
7 the 1. They have that data.

8 THE COURT: Would there be  
9 combinations sold of Step 2 and Step 3 or Step 2  
10 and/or Step 3 in isolation?

11 MS. MURRAY: I don't think 2 and 3  
12 are combined in a kit by themselves. 3 can be a  
13 stand-alone.

14 THE COURT: 3 can be a stand-  
15 alone. That's the one that Mr. Palys  
16 indicated --

17 MS. MURRAY: Yes. I don't why  
18 Mr. Paunovich relates that we've given that  
19 before. We haven't because 3 was never accused.  
20 We don't believe 3 should be accused as  
21 Mr. Palys explained on the Motion to Dismiss.  
22 So we've never given sales of 3 as a stand-alone  
23 because it doesn't relate to this patent which  
24 requires mixing with bleach. But when 3 is



1 combined with a kit with 1, we have provided  
2 those sales.

3 THE COURT: Talk to me about  
4 licensing documents.

5 MS. MURRAY: Yes, so licensing  
6 documents, they've asked an interrogatory about  
7 this. We've given them an interrogatory  
8 response about this. L'Oreal USA doesn't have  
9 licensing agreements other than with L'Oreal SA.  
10 They've looked for them. L'Oreal USA doesn't  
11 own the IP. We have agreed to produce the  
12 licensing agreements, the technology transfer  
13 agreements with L'Oreal SA that L'Oreal USA has  
14 entered into.

15 THE COURT: Have they been  
16 produced yet?

17 MS. MURRAY: I don't believe  
18 they've been produced. They were supposed to be  
19 produced in the last production. When I looked,  
20 I couldn't find them. But we have agreed and we  
21 will produce them.

22 THE COURT: When? I need a  
23 deadline. Can I put the same Friday deadline?

24 MS. MURRAY: Yes.

1 THE COURT: Thank you. All right.  
2 No. 3, profit cost info. They were looking for  
3 Excel spreadsheets with raw data and you  
4 answered an interrogatory.

5 MS. MURRAY: We did and we did it  
6 the same way we did the sales. We provided all  
7 the data in that interrogatory and it breaks out  
8 the cost and profit by SKU. This is exactly  
9 what they asked for. We said at the meet-and-  
10 confer this is what we will give them and their  
11 counsel said, okay, we will do the same.

12 They chose to put it in a  
13 spreadsheet. We've given them the data, the  
14 same data. They have the data. They have the  
15 cost and profit data.

16 THE COURT: And let's talk about  
17 worldwide sales.

18 MS. MURRAY: So worldwide sales,  
19 so it does matter that it's a method patent. So  
20 in the WesternGeco case the court said when you  
21 focus on Section 284 damages, in a given case we  
22 must look at the type of infringement that  
23 occurred. And then the court turned to the  
24 Section 271(f) analysis shipping components.

1 This is not a case about shipping components  
2 anywhere.

3 You don't practice a method using  
4 components. And I think it was pretty clear  
5 there's a case from the Federal Circuit, the  
6 sale of equipment or products to perform a  
7 process is not a sale of the process. So if a  
8 product is made in the United States and sold  
9 abroad and it may infringe a method patent, that  
10 doesn't constitute infringement. It's  
11 completely irrelevant.

12 So the larger issue here, Your  
13 Honor, is that L'Oreal USA does not sell  
14 products outside the United States, so there may  
15 be products Mr. Paunovich sees language of these  
16 products that's not in English but that doesn't  
17 mean that's a sale by L'Oreal USA. L'Oreal does  
18 not recognize or sell its products outside of  
19 the United States. This is not a 271(f) case.  
20 They haven't alleged 271(f).

21 THE COURT: Is that representation  
22 under oath anywhere like in an interrogatory  
23 response of L'Oreal USA --

24 MS. MURRAY: Not yet because they

1 haven't taken a deposition. Mr. Paunovich  
2 deposited the distributor of all three products  
3 yesterday and he asked where those products are  
4 sold and she testified as a 30(b)(6) witness  
5 that all the products are sold in the United  
6 States and it was for SalonCentric which is not  
7 the sole distributor of the products, but  
8 distributes all three of the L'Oreal products, a  
9 large chunk of them. And she said they don't  
10 sell outside of the United States.

11 So I don't know what we would have  
12 to give them if they wanted it, but I don't  
13 think it would even be relevant because it's not  
14 a component case. Even if it were able to fall  
15 under 271(f) because there are substantial  
16 noninfringing uses for this product, you can  
17 have the product and use it with color, you can  
18 have the product and use it with relaxer or  
19 perms so there is no infringement if this  
20 product was shipped outside the United States  
21 and used for all of those other purposes.

22 They don't get access to worldwide  
23 sales in this case. And even if they did, they  
24 don't have them for L'Oreal USA. I'm not sure

1 what we can give them.

2 THE COURT: Going back to Item No.  
3 1, financials for Step 3 as a stand-alone, do  
4 you have a sense of what volume and how  
5 difficult it would be to produce those  
6 financials?

7 MS. MURRAY: I don't think it  
8 would be difficult. We provided the other one.  
9 They don't have the documents laying around so  
10 we would have to clear the database. L'Oreal's  
11 Finance makes sure that they verify those  
12 numbers before they go out. It's like a step in  
13 verification, but it's just clearing the  
14 database for those Step 3 products if we had to  
15 produce those.

16 THE COURT: If the Court were to  
17 order that, what is a reasonable time frame for  
18 that production?

19 MS. MURRAY: They won't release  
20 the numbers to me until Finance verifies them.  
21 So next week, I can aim for next week.

22 THE COURT: Remind me again when  
23 is the fact discovery cut-off.

24 MS. MURRAY: December 21. I can

1 aim for this week, but I don't want to commit if  
2 I don't --

3 THE COURT: I understand.

4 MS. MURRAY: They're at year-end  
5 right now and it's the worst time for them.

6 THE COURT: Okay. Anything  
7 further, Mr. Paunovich?

8 MR. PAUNOVICH: Two points of  
9 clarification. The No. 2 products are also sold  
10 stand-alone and if Your Honor is ordering that  
11 for the No. 3, we would also request it for the  
12 No. 2. For the licensing topic, we heard that  
13 they would produce agreements with L'Oreal that  
14 they've entered into with L'Oreal USA.

15 We've asked for inbound licenses  
16 as well. So the fact that L'Oreal USA says that  
17 it doesn't own L'Oreal IP doesn't address any  
18 inbound licenses that they would have entered  
19 into. So, for example, if somebody else accuses  
20 them of infringement or they want a license for  
21 the IP, we do think that those would be  
22 relevant. And to the extent that they have  
23 entered into a such license, that should be  
24 produced as well.

1                   Lastly, on the worldwide sales we  
2           do think that Judge Stark's opinion on this  
3           regarding WesternGeco would compel the  
4           production of it. We have nothing sworn under  
5           oath. They just acknowledged we have a  
6           distributor, not the sole distributor who has  
7           testified about not selling things worldwide.

8                   And Judge Stark, as he said  
9           worldwide patent damages relating to supplying  
10          components from the U.S. to be combined outside  
11          the U.S. in a manner that would be infringing  
12          may be awarded, so we would request an order on  
13          each of those items.

14                   THE COURT: Okay. Let me ask,  
15          Ms. Murray, is Step 2 sold as a stand-alone?

16                   MS. MURRAY: There is a  
17          stand-alone in Step 2, yes.

18                   THE COURT: Okay. Thank you.

19                   MS. MURRAY: Your Honor, it's  
20          interesting because the whole time there was a  
21          preliminary injunction they want to frame the  
22          market as only SalonCentric and this other  
23          distributor BSG and now Mr. Paunovich is trying  
24          to say that's just one distributor.

1 SalonCentric is a huge distributor and supplies  
2 a large amount of L'Oreal's products. They're  
3 welcome to ask the 30(b)(6) witnesses where the  
4 products were sold.

5 THE COURT: And I imagine that  
6 they will. In any event, here's my rulings on  
7 all four points to the financials: With respect  
8 to what I will call Category No. 1, the  
9 financials for Step 1, Step 2 and Step 3  
10 products Mr. Paunovich mentioned, and what's  
11 missing from this equation is Step 2 and Step 3.  
12 L'Oreal has represented to the extent Step 2  
13 and/or Step 3 were grouped with Step 1, those  
14 have already been produced.

15 I'm going to order that the  
16 financials for Step 2 as to stand-alone and Step  
17 3 as to stand-alone products be produced, and I  
18 will give a deadline by the end of next week  
19 which is the 21st, which coincides with the end  
20 of fact discovery. And should that generate any  
21 additional discovery issues or requests or  
22 whatever, then I'm sure you'll be prudent about  
23 what the Plaintiff requests from the Court. But  
24 nonetheless, I think giving the timing of things



1 it wouldn't be reasonable to compel L'Oreal to  
2 produce those any sooner given what the process  
3 is within L'Oreal to comply with this court  
4 order and review the production that the Court  
5 is ordering to be produced.

6 With respect to Category No. 2,  
7 the licensing agreements, L'Oreal has already  
8 committed prior to this hearing to produce those  
9 licensing agreements with L'Oreal SA. I will  
10 order that those be produced by the Friday  
11 deadline. And to the extent L'Oreal USA is a  
12 party to any inbound licenses for hair care  
13 products, I will order that they be produced as  
14 well by Friday.

15 MR. PAUNOVICH: Is that this  
16 Friday, Your Honor, or is that also the  
17 following Friday for the --

18 THE COURT: I will order it by  
19 this Friday. And if there's any impediment, I'm  
20 sure counsel will be reasonable in working those  
21 out.

22 It's my understanding that you  
23 were already working on getting the L'Oreal SA  
24 licensing agreements so it --

1 MS. MURRAY: Yes.

2 THE COURT: -- shouldn't be any  
3 issue or a problem. To the extent for the  
4 inbounds and you need more time for that, just  
5 discuss it with Mr. Paunovich how much  
6 additional time you need and I'm sure he will be  
7 reasonable if there's good reason for pushing  
8 that out a little bit further. And certainly,  
9 the Court is flexible on that if it takes some  
10 additional time to produce those.

11 With regard to the profit, cost  
12 information that was produced in the  
13 interrogatory response, I'm going to deny the  
14 Motion to Compel with respect to that. I  
15 haven't heard what's deficient, if anything,  
16 about the interrogatory response. It sounded to  
17 me that it was presented in a form that you  
18 would prefer would have been Excel spreadsheet  
19 showing the raw data. However, that's not  
20 without prejudice to the Plaintiff.

21 If you think that there was  
22 anything being withheld or that interrogatory  
23 response is lacking, you can raise it with the  
24 Court. But I haven't heard that the substantive

1 interrogatory response leaves out anything or  
2 any information that wouldn't be provided in an  
3 Excel spreadsheet of the raw data having been  
4 produced in that format.

5 With regard to the issue of  
6 worldwide sales, at this time I don't feel that  
7 there's a record to support compelling  
8 production from L'Oreal of worldwide sales, so  
9 I'm going to deny Olaplex's request with respect  
10 to that. And I think that involved requests for  
11 Production Nos. 47, 49 and 51 which seek  
12 information regarding manufacturers, suppliers  
13 and distributors of the accused products, et  
14 cetera.

15 And here is my reasoning for that:  
16 Olaplex argues that this information is  
17 discoverable under Chief Judge Stark's recent  
18 decision in Power Integrations v. Fairchild  
19 Semiconductor. The Westlaw citation is 2018  
20 Westlaw 48804685. It's a District of Delaware  
21 decision from October 4, 2018.

22 And Olaplex also cited to the  
23 Supreme Court's decision -- both sides discussed  
24 the Supreme Court's decision in WesternGeco LLC

1 v. ION Geophysical. However, this judicial  
2 officer views the patents-at-issue in  
3 WesternGeco, that they were not method patents  
4 in contrast to the '419 and the '954  
5 patents-at-issue here.

6 The Fed circuit has held that  
7 section 271(f) of the patent statute does not  
8 apply to method or process patents. And as that  
9 section does not encompass devices that may have  
10 been used to practice the patented method, the  
11 relevance of whether or not this information  
12 would have any bearing on the claims asserted in  
13 this case, it is questionable.

14 And at this point on this record,  
15 it may even be a moot point in light of the  
16 representations made by the SalonCentric witness  
17 that none of the products were being sold  
18 abroad, and I suspect that as further  
19 depositions are taken, this particular issue may  
20 be buttoned up to the extent that L'Oreal's  
21 counsel are arguing that L'Oreal USA has been  
22 selling products beyond the United States.

23 That's my view of the WesternGeco  
24 and Power Integrations rulings. And this may

1 became a moot point. If it's not, certainly  
2 it's without prejudice to the Plaintiffs to  
3 raise this issue and it probably is an issue  
4 worthy of briefing since it is kind of a new  
5 twist, so to speak, I think in my view on Power  
6 Integrations and WesternGeco and application of  
7 Section 271(f) of the patent statute.

8 Naturally, any bench rulings I  
9 make today on this or other issues are subject  
10 to timely objections under Rule 72(a). The  
11 transcript will serve as my order. I won't be  
12 following up with a written order so within 14  
13 days of service of this transcript, any party  
14 who wishes to take an objection to the District  
15 Judge may do so and make a timely objection to  
16 the District Judge, Judge Bataillon to determine  
17 whether my ruling is clearly erroneous or  
18 contrary to law. So that deals with the  
19 financial and licensing issues that were raised  
20 by the Plaintiffs.

21 Let's dial back to the next issue  
22 that L'Oreal would like to raise.

23 MS. MURRAY: Your Honor, the next  
24 issue raised in our letter relates to disclaimer

1 of claims document. On this one, our position  
2 is basically to the extent that there's  
3 something that is not privileged, we would like  
4 to see it. If it's privileged and it involves  
5 prosecution counsel, we want a commitment that  
6 it's going to show up on a privilege log. We  
7 have concern as we are touching on with respect  
8 to the protective order regarding what's going  
9 on with the prosecution counsel.

10 THE COURT: We've had so many  
11 discovery disputes in this case and in my  
12 optimism that with each one will be closure to  
13 the issue, it's my recollection that we  
14 addressed this in a previous discovery dispute  
15 and I ended up following up that dispute with an  
16 August 30 memorandum order to which my review of  
17 the docket indicates that there were no  
18 objections. Why are we revisiting this issue?

19 MS. MURRAY: The issue before the  
20 Court before was a request to modify the  
21 protective order in light of concerns that  
22 counsel in this case were using documents that  
23 shouldn't be used. And the Court said it  
24 doesn't look like there's enough there for

1 grounds to modify the protective order.

2 We have concerns and we continue  
3 to have concerns that to the extent that it was  
4 revealed that there was more participation than  
5 has been shown to light, we would like to  
6 explore the extent of that participation. If  
7 it's privileged, they can just put it on a  
8 privilege log, and we would like to see the  
9 extent of that.

10 It wasn't so much an issue before  
11 where we were seeking to modify the protective  
12 order, but we continue to have these concerns  
13 and we've asked for documents to either put our  
14 concerns to rest or if there are concerns, we  
15 would just like to know what's going on and we  
16 just don't have visibility to that.

17 THE COURT: Let me hear from  
18 Olaplex.

19 MR. PAUNOVICH: Your Honor, we  
20 thought this issue had been put to bed as well.  
21 We had a discovery dispute after which Your  
22 Honor asked for additional briefing, issued an  
23 order at D.I. 388, and we thought made very  
24 clear that this was a resolved issue.

1 My guess is what counsel is asking  
2 for -- they're asking for facially privileged  
3 information or log I guess every communication  
4 that counsel has had subsequent to filing this  
5 suit. The typical practice and I don't see any  
6 reason to deviate from it, once a suit is filed  
7 everything from there forward is presumptively  
8 privileged. Now, we're going to privilege log  
9 two year's worth of litigation and PGR  
10 proceedings. I don't understand why we're going  
11 through these hoops on a fishing expedition  
12 again.

13 Parties have been in negotiations  
14 on providing privilege logs and Olaplex is ready  
15 to produce its privilege log if not today,  
16 probably tomorrow. To go back and log two  
17 year's worth of communications in this suit and  
18 in the PGR proceedings is a monumental  
19 undertaking.

20 I'm sure if their counsel is  
21 anything like ours, we are in communication  
22 every single day dozens of times. It's been a  
23 lengthy dispute and respectfully we think this  
24 issue should be put to bed here without any



1 further orders. Thank you.

2 THE COURT: All right. Anything  
3 further, Ms. Murray?

4 MS. MURRAY: Nothing further, Your  
5 Honor.

6 THE COURT: All right. I'm going  
7 to deny this request for nonprivileged documents  
8 and communications regarding Olaplex's decision  
9 to disclaim claims of the asserted patents.

10 It's a variation of an issue that in my view  
11 there's no record to move ahead or look at this  
12 differently than the way I've looked at it back  
13 in August.

14 I'm not going to put the  
15 Plaintiffs nor would I if a similar request had  
16 come from Plaintiffs to L'Oreal, it would be an  
17 extreme measure, I think, to require either side  
18 to start putting together privilege logs for  
19 communications occurring subsequent to the  
20 commencement of the instant litigation and/or  
21 PGR proceedings.

22 I addressed the issue before when  
23 I rejected L'Oreal's requested relief for  
24 modification of the protective order previously

1 and I don't see any set of facts which would  
2 cause me to deviate from that view of the  
3 landscape and feel that it's necessary for a  
4 request to disclose any privilege log and  
5 privileged communications relating to  
6 disclaimer, so that is denied.

7 It's denied without prejudice.  
8 Should something come to light, I will  
9 reconsider the basis for going in a different  
10 direction but I don't see it right now.

11 So I will switch it back over to  
12 Olaplex for its next issue.

13 MR. PAUNOVICH: Your Honor, this  
14 is Heading No. 2 in our discovery dispute  
15 letter, failure to produce alleged clean room,  
16 data room custodial documents. This is a very  
17 critical one, Your Honor, from our perspective.  
18 We've seen submissions from L'Oreal saying, oh,  
19 well, we have this X employee that used to work  
20 for us two years ago and he claims that he never  
21 got Olaplex's unpublished patent application.

22 And we have a brewing dispute  
23 which we'll hopefully resolve and not have to  
24 bring another discovery dispute to Your Honor.

1 But after that deposition, L'Oreal says, after  
2 the fact, we didn't tell you ahead of time but  
3 we want to designate his testimony, the  
4 ex-employee as our 30(b)(6) testimony about the  
5 receipt of this unpublished patent application.

6 We don't think that's proper.  
7 We'll deal with that in separate channels  
8 because it's not part of the briefing here. But  
9 I think what it highlights is the importance of  
10 these documents that are under this category.  
11 There are two very telling documents.

12 If you look at -- let me just get  
13 the exhibits to make sure I have them correctly  
14 here, so Exhibit F to our discovery dispute  
15 letter. It's an internal listing of individuals  
16 that work for L'Oreal who had access to a  
17 so-called clean room and separately, this is  
18 important, a data room relating to these  
19 discussions and meetings that occurred between  
20 Olaplex and L'Oreal back in 2015 that really get  
21 to the core of the trade secret and breach of  
22 NDA.

23 And when we look at those lists,  
24 we see a high level point, number one, in the

1 latest one, Exhibit F, there's about 45  
2 employees that are listed on it. And when we go  
3 to L'Oreal's document productions in this case  
4 and we look at the metadata to say, did you  
5 collect the custodial data from people who are  
6 clearly relevant to this case, we see three from  
7 that list.

8 Now, it sounds like a lot and it  
9 is, but I didn't create the document. We've got  
10 a document that on its plain face says these are  
11 people that are involved in the potential  
12 Olaplex proposition and the developments of the  
13 accused products and yet, we have no documents,  
14 no communications from over 40 of those  
15 individuals.

16 The notion as L'Oreal suggested  
17 that they are not relevant, might not have  
18 relevant information to this which is belied by  
19 the face of the document. What's more telling  
20 is they're relying on this ex-employee two years  
21 ago who by his own admission had no access to  
22 this clean room, so he wouldn't have sufficient  
23 personal knowledge to comment on it in the first  
24 place.

1 So they say, well, he testified.  
2 We never got anything. Putting aside the fact  
3 that he wouldn't have had access to it anyway on  
4 his own admission, what is very notable is if  
5 you look at Exhibit H, April 27th and you look  
6 at it, so that's pre-May 19, 2015, that's really  
7 the key meeting where a lot of these trade  
8 secrets and confidential information were  
9 disclosed. And then you look at Exhibit F dated  
10 July 2, 2015 and it grows by 30 individuals.

11 If what Mr. Dolden said is true  
12 and you never got anything from us, which we  
13 strongly contest and we have multiple witnesses  
14 who have sworn under oath the opposite, then why  
15 would you add 30 people after that meeting to  
16 the team that has access to this data room and  
17 clean room or one or the other for that matter.

18 So with that sort of preamble, and I  
19 apologize for the long wind-up, we are asking  
20 for documents that relate to custodial documents  
21 for each of the individuals that are on these  
22 lists. We're not asking them to give us the  
23 whole computer, but we do think documents that  
24 each of them have that is relevant to the claims

1 and defenses in this case including our trade  
2 secret and NDA claim should be produced.

3 We've provided some descriptions  
4 of that in our discovery letter. So unless Your  
5 Honor needs me to further articulate those, I  
6 can. But it's sort of a stark moment where  
7 we're saying, we want to prove our trade secret  
8 and breach claim and we don't have access to any  
9 of these individuals' documents to prove that.

10 We're told that we're going to  
11 have to rely on an ex-employee who produced one  
12 document in this case under his Bates label who  
13 just says, yeah, we never got anything. It's  
14 just not credible on its face.

15 THE COURT: All right.

16 MR. PAUNOVICH: Thank you, Your  
17 Honor.

18 THE COURT: Ms. Murray?

19 MS. MURRAY: Your Honor, you might  
20 be familiar already but the code name for this  
21 potential acquisition was Project Olivia. There  
22 are documents like this and I have many, many  
23 more and I'm happy to give the Court as many as  
24 she wants to see about Project Olivia.

1 I don't know the one sheet of  
2 paper Mr. Paunovich is talking about. That's  
3 just, I'm sorry to say, ludicrous. Here is what  
4 happened: There was a clean room established.  
5 It had three people -- three scientists and five  
6 lawyers. Those were the people who were set up  
7 to be able to review any confidential, technical  
8 information that Olaplex would have provided at  
9 that May meeting, the one inperson meeting where  
10 all of this alleged secret happened, eight  
11 people. That list has never been expanded.  
12 There's a separate list --

13 THE COURT: Have the custodial  
14 documents been produced from those individuals  
15 that you've just described for the scientists  
16 and lawyers who had access to the clean room?

17 MS. MURRAY: Let me back up.  
18 There was nothing ever placed in a clean room,  
19 so we need to start with that. There was never  
20 anything given to L'Oreal to put in a clean  
21 room, so there is a non-existent clean room.  
22 This was the clean team that was set up.

23 The scientists who attended the  
24 meeting -- not all of these people were at this

1 meeting. Only one was, and her name was  
2 Delphine Allard. The documents that L'Oreal USA  
3 has received for all the meeting notes that were  
4 exchanged about this meeting have been produced.

5 Roger Dolden was at this meeting.

6 Mr. Dolden's notes have been produced.

7 Mr. Dolden took back documents that he did  
8 receive, financial documents that were received  
9 from Olaplex complex at this meeting. He had a  
10 binder in his office before he retired, two  
11 binders. This is actually one of them. So his  
12 entire Project Olivia binder has been produced.  
13 It includes everything that Olaplex provided.

14 We can't manufacture something  
15 that was not given at a meeting. Let me explain  
16 why we have a data room and we can get rid of  
17 this suspicion that they're suggesting. The  
18 data room was going to be or was basically a  
19 list of people who would know about the  
20 acquisition or potential acquisition. It was  
21 mostly finance folks, but not all.

22 The vast majority of this list  
23 that Mr. Paunovich is referring to are not  
24 employees of L'Oreal USA. And why is that?



1 Because when L'Oreal USA was looking to do this  
2 acquisition, they were also creating help from  
3 L'Oreal SA to create international business  
4 plans. Mr. Dolden explained this in his  
5 deposition.

6 So the people who are creating  
7 international business plans are not at L'Oreal  
8 USA. They would, first of all, have never  
9 received this technical document, this financial  
10 document. And all documents that L'Oreal USA  
11 corresponded to with these individuals have been  
12 produced.

13 I can go through the names and  
14 there's also a lot of attorneys on this list.  
15 Some of those were logged as privileged, but the  
16 vast majority of -- the reason it kept expanded  
17 is because certain people became aware, hey, I  
18 need you to run these numbers, we have to do a  
19 business plan on X, Y, Z, can you run these  
20 numbers for a potential acquisition. So you add  
21 them to the list.

22 Adding them to the data room list  
23 basically means that you are now on notice. You  
24 cannot talk about this potential acquisition

1 with anybody else within the company. It  
2 doesn't mean they were now handed a secret  
3 technical document. The data room doesn't  
4 relate to the technical document. That's the  
5 clean room. That was eight people. Notes from  
6 the meeting were produced.

7 When Mr. Paunovich says that Roger  
8 Dolden was at this meeting, he was leading the  
9 acquisition. He wasn't just a former employee.  
10 He was the head of mergers and acquisitions of  
11 L'Oreal for 30 years. He was leading this  
12 acquisition. He brought with him one scientist.  
13 They sat at the meeting, the tiny table at a  
14 public restaurant.

15 He was testified what was handed  
16 over at the meeting. No, he was not on the  
17 cleaning room that would have started  
18 reviewing -- I'm sorry, not part of the clean  
19 team that would have reviewed the technical  
20 information that would have come back from that  
21 meeting, but no technical information was  
22 provided.

23 Mr. Dolden testified they're at  
24 this table. If a patent application was crossed

1 over to provide to L'Oreal from Olaplex at this  
2 table, Mr. Dolden would have seen it. So to  
3 suggest that he wouldn't know anything about  
4 what the clean room or what the clean team had  
5 because he's not part of it, he was at the one  
6 and only meeting where this exchange would have  
7 happened.

8 His contemporaneous notes  
9 specified what was given to him at the meeting.  
10 He explained the financial information that was  
11 given to him at the meeting. His notes say, no  
12 new technical documents were shared. So we're  
13 just at a loss as to what we would be looking  
14 for that they want that we can give them because  
15 we're not going to locate a document that was  
16 not provided. And what was provided to L'Oreal  
17 at that meeting has been produced.

18 THE COURT: Okay.

19 MR. PAUNOVICH: Your Honor, we  
20 have approximately 45 employees that we didn't  
21 hear from L'Oreal as having documents being  
22 collected from them, reviewed or produced for  
23 relevance in this case. They are on this list  
24 for a reason. What did they receive from these

1 three people in the clean room? How did they  
2 use it? Did it end up in the accused products?  
3 Each of these questions may be answered by those  
4 questions.

5 The fact that they by their  
6 admission were part of the list to know about  
7 this to get information about the acquisition, I  
8 think, clearly tells the story that they've got  
9 relevant information and we respectfully request  
10 that we should have those documents. Those  
11 documents should be reviewed and produced to the  
12 extent that they're relevant.

13 If they go to those 45 employees  
14 and search their documents and nothing says  
15 Olaplex or they don't have anything about the  
16 accused products, so be it. We're not asking to  
17 image their computers and back up the truck.  
18 We're asking for relevant information. The fact  
19 that they've given us a select few documents  
20 from a few people does not address what we're  
21 missing.

22 The people that they mentioned,  
23 the three, Hugo Kunetz, this is the guy who is  
24 missing in Dubai who they have said they

1 represented at one point and nobody can find  
2 him. We've had process servicers in garages in  
3 subterranean Dubai, skyscrapers, can't find him,  
4 so we can't depose him, can't get his documents.

5 Delphine Allard, she's the subject of  
6 the letter's request that's currently being  
7 objected to that was ordered by the Court. We  
8 don't have access to her. We don't have her  
9 documents. She's supposedly under the umbrella  
10 of SA at this point. Marshall Gringauz, the one  
11 attorney who is on this clean room list. We  
12 don't have a privilege log yet and he, to my  
13 understanding, works for SA so I'm not sure  
14 we're going to get anything logged regarding  
15 him.

16 However, we do know that there are  
17 45 people that we have no documents from,  
18 custodial whatsoever, but clearly had some  
19 information. The last point is there are many  
20 documents if Your Honor wanted that we could  
21 bring forward that were in the Dolden  
22 deposition.

23 We just didn't want to burden the  
24 Court with producing a full deposition where

1 he's saying to his boss right before they're  
2 about to tell Olaplex, we don't want to buy you  
3 anymore. I'm very uncomfortable with this  
4 patent -- I'm paraphrasing right now. I'm very  
5 uncomfortable this patent situation. I want to  
6 send you my notes before I send this out to the  
7 team, but I just want you to know -- his main  
8 boss, the CEO of L'Oreal USA, I'm uncomfortable  
9 with this situation. So we don't have the full  
10 story and we just want the full story, whatever  
11 that may be. Thank you.

12 MS. MURRAY: Your Honor, just real  
13 quick. If you want specifics, 26 of these  
14 people on this list are not L'Oreal USA  
15 employees. As to people that are on the list  
16 that are USA employees, Marshall Gringauz, he's  
17 an attorney, inhouse counsel for L'Oreal USA.  
18 205 documents have been produced with  
19 Mr. Gringauz. Same thing, Boulineau, he's on  
20 the list, 407 documents. Another person from  
21 L'Oreal USA, Mr. Koten, 243 documents. They  
22 have documents from each of these people.

23 If we were to go and have to  
24 collect all of their computers to search for a

1 patent application that was never handed over in  
2 this case -- I mean, if we can get a  
3 representation from them that if we search all  
4 of these computers and we don't find that  
5 notorious patent application, are they going to  
6 drop the trade secret claim?

7 His last suspicion about  
8 Mr. Dolden telling the CEO that he's very  
9 concerned proves our point. He was concerned  
10 because the R&I, the L'Oreal team working on the  
11 accused products at the same time had no  
12 visibility into what patents were going on, on  
13 the Olaplex side, so he was concerned about that  
14 because he met with Dean Christal and Dean  
15 Christal tells him in September at the end that  
16 he's going to get some patent, so he's concerned  
17 because he knows that R&I is doing something  
18 separate because they're isolated and they have  
19 no visibility of what Olaplex is doing and what  
20 was going to happen with the product and what  
21 was going to happen with the negotiations with  
22 Dean Christal.

23 The cleaning documents, all  
24 training, all the guidelines, everybody has

1 acknowledged them, they have all been produced.  
2 I don't even know what we would search for if we  
3 had to go through these custodians, which again  
4 I went through this last night, documents from  
5 each of these people have been produced in this  
6 case. I don't know what else to give them.

7 THE COURT: All right. On this  
8 issue I am denying Olaplex's request without  
9 prejudice. The record reflects that L'Oreal  
10 produced numerous volumes of documents regarding  
11 the potential acquisition in 2015. And L'Oreal  
12 has indicated that no records were kept  
13 regarding these documents replacing the clean  
14 room and L'Oreal cannot produce that because it  
15 doesn't have individuals on the data room  
16 permission list and knowledge relevant to  
17 potential acquisition, but L'Oreal has indicated  
18 that to the extent custodial searches were  
19 performed for some of those individuals for  
20 L'Oreal USA, those documents have already been  
21 produced and for other individuals on that data  
22 room permission list had knowledge but did not  
23 have access to confidential technical  
24 information.



1                   It's disproportional I find at  
2                   this stage for the Court to order custodial  
3                   searches for all 45 individuals, who 26 L'Oreal  
4                   represented are not employees of L'Oreal USA,  
5                   particularly since many of these individuals are  
6                   not employed by L'Oreal or no longer employed by  
7                   L'Oreal and are attorneys whose communications  
8                   are privileged.

9                   If there is a specific individual  
10                  on this list that because of other information  
11                  that's been produced in discovery the Plaintiffs  
12                  can make a reasonable argument that there ought  
13                  to be a custodial search, I'll hear it. But I'm  
14                  not at this stage inclined to order searching  
15                  computers for 45 people in the hopes that  
16                  something can be found beyond what has already  
17                  been searched for and produced in this  
18                  litigation at this time. So that is my ruling  
19                  on that issue.

20                  MR. PAUNOVICH: Your Honor, may I  
21                  ask a point of clarification?

22                  THE COURT: Yes.

23                  MR. PAUNOVICH: It was unclear to  
24                  me whether a representation was actually made

1 that the custodians that they represented they  
2 produced the documents relating to them, whether  
3 they've actually searched for those individuals.  
4 From the metadata what we see is they produced  
5 documents that actually have -- they're from  
6 somebody else and might have a person's name on  
7 it, but it's not clear to us at all from the  
8 metadata where you would identify a custodian  
9 that they've actually searched for these  
10 people's documents, so I think that's where  
11 there might be a disconnect.

12 I can give you one narrowing  
13 immediately, for example. Anthony Potin is an  
14 inventor on the L'Oreal patents. He's part of  
15 this 45-person list that developed the accused  
16 products, who supposedly had access to this  
17 information. I don't believe that we have any  
18 metadata indicating that he was a custodian.

19 The last point being, L'Oreal  
20 seems to shuffle people around a lot but  
21 maintains documents. So they mention a bunch of  
22 people, 26 apparently that work for SA. But I  
23 think the question is do they have possession,  
24 custody and control of anybody's documents.

1 I understand Your Honor's ruling,  
2 but those were a couple of points that were  
3 unclear to me whether we're getting the right  
4 representation about what we have.

5 THE COURT: Well, I think you need  
6 to clarify that with the other side first and  
7 meet and confer. And if you're convinced  
8 there's a basis to ask the Court to order  
9 L'Oreal to do a custodial search, then I'll hear  
10 you out on that. Let's just leave it at that at  
11 this point. Let's move on to the additional  
12 issues.

13 L'Oreal, next issue.

14 MS. MURRAY: I think our next  
15 issue is a quick one, Your Honor. It's Request  
16 No. 81 concerning the validity of the asserted  
17 patent. We don't believe we've received all of  
18 the foreign filings from Olaplex. Their  
19 response is that they had produced their foreign  
20 PGR filings, but our request was not limited to  
21 that.

22 There were representations made  
23 about these patents in foreign jurisdictions is  
24 relevant, so we weren't limiting it to PGR. If

1 their position is they've given us everything  
2 they've filed in these foreign jurisdictions  
3 that's relevant, we'll have to take them at  
4 their word. It sounds like they've only given  
5 us one PGR filing.

6 THE COURT: All right.

7 Mr. Paunovich?

8 MR. PAUNOVICH: I know that that  
9 is not true. We have provided foreign patent  
10 filings. Anything that's been publicly filed  
11 we've provided to my knowledge. They're ongoing  
12 prosecutions so I don't have the exact data in  
13 hand. I think it was maybe three or four months  
14 ago. We have literally backed the truck up and  
15 gathered every foreign filing from our foreign  
16 patent agents and provided it to them.

17 If there's something they're aware  
18 of that they think they're missing, we're happy  
19 to go back and see if we have it and produce it,  
20 but I'm not aware of anything.

21 THE COURT: So the production from  
22 the foreign patent prosecutions of publicly  
23 available documents was made how long ago?

24 MR. PAUNOVICH: I have to get the

1 date for you, Your Honor. I think it was just a  
2 couple of months ago. As you recall, in the  
3 claim construction proceeding, we saw extensive  
4 examples of those cited. If you look at those  
5 documents, they have Olaplex labels on them. So  
6 at least as of the time of the briefing for  
7 claim construction, we had provided this  
8 substantial production.

9 I know and it might be in our  
10 papers, but it's thousands of pages of foreign  
11 prosecution filings and there was no intent to  
12 withhold any of them. We literally asked for  
13 everything and produced it at that time.

14 THE COURT: What I'll ask on this  
15 issue is that you supplement. As you said to  
16 the extent that there are prosecutions which are  
17 ongoing, that you make a supplemental production  
18 by the close-of-fact discovery by December 21st  
19 of any additional materials from these foreign  
20 prosecutions.

21 MR. PAUNOVICH: That deadline I  
22 will do our absolute best. I'm not sure we will  
23 be able to meet that. We have over 100 patent  
24 applications in a ton of jurisdictions. I do

1 recall the last time we did this because we had  
2 to coordinate with perhaps 10 or a dozen or more  
3 foreign patent agents, we may be slightly at the  
4 whim of people that are in far-afield locations.  
5 And the person who coordinates that, Rivka  
6 Monheit who is our prosecution counsel, is being  
7 deposed next Wednesday, so I'm sure she will be  
8 involved in getting ready for that deposition.

9 Your Honor, we would do the same  
10 thing if it's okay with Your Honor. If there's  
11 some problem with that, we will speak with  
12 opposing counsel. But it may be that it takes a  
13 little bit longer than that.

14 THE COURT: I would direct you to  
15 do that and I would direct L'Oreal's counsel if  
16 there are specific items that you're looking for  
17 in that patent prosecution, rather than be a  
18 document dump, that you assist Mr. Paunovich and  
19 whatever team needs to be assembled to  
20 supplement to look for specific things in those  
21 foreign prosecutions.

22 MS. MURRAY: Absolutely, Your  
23 Honor.

24 MR. PAUNOVICH: Thank you, Your

1 Honor. Your Honor, the next topic is No. 3 in  
2 Plaintiffs' dispute letter, failure to produce  
3 certain lab notebooks and related documents.  
4 This is another one where we thought it had been  
5 put to bed back in the August 1st discovery  
6 hearing.

7 L'Oreal was ordered by Your Honor  
8 to produce all lab notebooks responsive to our  
9 request. We identified specific lab notebooks  
10 for about 12 or so people during that hearing  
11 and Your Honor had ordered those to be produced.  
12 The only exception to that order that Your Honor  
13 made was that L'Oreal could redact for  
14 nonresponsiveness, meaning it relates to  
15 something far afield. But very directly in  
16 field were the inventors on the specific patent  
17 applications that we think are incredibly  
18 germane and relevant to our trade secret claim.

19 We have not gotten all of those  
20 lab notebooks. L'Oreal has told us after some  
21 pressing that they deem the lab notebooks  
22 relating to those patents as being nonrelevant.  
23 Yet when we look at the claims that are within  
24 the second of the two patent applications, we

1 see that it maps one-for-one onto their accused  
2 products down to the ingredient on the  
3 ingredient list.

4 Just as a reminder, pre-May 19,  
5 2015 meeting we saw the one patent application  
6 that's going to be on their planned bond  
7 builders and it uses a different active agent,  
8 malonic acid, so it's about two weeks before  
9 they file that. And they meet with us, get our  
10 patent application and other materials, and they  
11 file a new application, the second of two that  
12 we've called attention to, same set of inventors  
13 and lo and behold, it has maleic acid as an  
14 active ingredient. We think it's clearly  
15 relevant.

16 In addition, among the lab  
17 notebooks that they have produced, there are 17  
18 cross-referenced documents. So we have lab  
19 notebooks that they said, these are relevant,  
20 although they contend now that maybe they don't  
21 think they're relevant anymore but that's a  
22 dispute for another day. And within those lab  
23 notebooks the inventors are going down and it  
24 says, go look at this other document.



1 It doesn't matter what you call  
2 the other document, whether it's a lab notebook  
3 or a napkin. It cross-references. Go look at  
4 this. There are 17 of those. So we asked for  
5 them and L'Oreal said, well, they're not lab  
6 notebooks. We said, well, they're  
7 cross-referenced. They're clearly relevant. We  
8 need to see them so that we can probe that and  
9 make that determination ourselves.

10 The fact that they're in a  
11 relevant section of a lab notebook and  
12 cross-referenced, we think is prima facie  
13 evidence of their relevance and that those  
14 should be produced as well. Unless Your Honor  
15 has any questions?

16 THE COURT: No questions.

17 MR. PAUNOVICH: Thank you.

18 MR. PALYS: So where did this come  
19 from, these lab notebooks, this issue? It's the  
20 last comment that Mr. Paunovich raised which was  
21 we produced hundreds and hundreds of pages of  
22 documents and they found these L numbers in some  
23 presentation and then they tried to track that L  
24 number to a notebook. So in L'Oreal's language,

1 sometimes lab notebooks have L and number,  
2 number, number. That doesn't mean that's the  
3 only thing those L numbers might represent.

4 I believe there was a  
5 communication, they give a list of L numbers to  
6 us and said, where are these. We can't find  
7 them in the production. So we went and looked  
8 and this was during the middle of a deposition  
9 when Mr. Dolden was deposed so a little bit of  
10 delay there. We finally did that.

11 Long story short is this: We have  
12 looked. And from what we understand right now,  
13 and it's in our letter to Her Honor, the list of  
14 documents, the ones that we did find were not  
15 relevant. And you may recall when we had the  
16 discussion with you about producing lab  
17 notebooks back in August where Your Honor  
18 recognized these notebooks may have information  
19 that has nothing to do with any of the accused  
20 products, that's what we're dealing with, with  
21 those numbers that were not relevant.

22 Some of the L numbers were even  
23 lab notebooks. And out of the ones that were  
24 remaining, we said we would look. Absolutely

1 just yesterday I had my hands on three of the  
2 notebooks that we found. So we're already in  
3 the process of scanning and we're going to  
4 produce them. But just to let the Court know,  
5 we heard Mr. Paunovich say this is the smoking  
6 gun, it's going to be information from what I  
7 understand is already in other notebooks. It  
8 has nothing to do with any detailed things about  
9 inventorship and patent application, but they'll  
10 see this.

11 It's going to be maybe four pages  
12 of one notebook is mostly empty. The second one  
13 is going to be a handful of pages out of another  
14 notebook that's going to have to be heavily  
15 redacted because it has nothing to do with this  
16 case and the third one is going to be the same  
17 way. And some of these relate to people that --  
18 one I believe is a temporary employee that  
19 wasn't around long at L'Oreal.

20 These aren't groundbreaking  
21 notebooks that they're waiting on, but we're  
22 going to give it to them. Hopefully we're  
23 getting them scanned today, we'll redact them  
24 and we'll send it to them. Other than that,

1 that's not much else we can give to them --

2 THE COURT: What you said you'll  
3 produce, what you've just described will be sent  
4 by Friday?

5 MR. PALYS: Yes, three documents.  
6 I think the redactions shouldn't take long so  
7 we'll do our best to send it by Friday.

8 THE COURT: What about the 17  
9 cross-references whether they go to other  
10 documents or other lab notebooks? Mr. Paunovich  
11 mentioned there's 17 cross-references that are  
12 noted in the lab notebooks that have been  
13 produced thus far.

14 MR. PALYS: I think that's what I  
15 was referring to, this whole category. Some are  
16 not relevant, some are not notebooks and the  
17 ones that we found we're producing. Thank you.

18 THE COURT: Okay.

19 MR. PAUNOVICH: Your Honor, I just  
20 want clarification. Are they producing the lab  
21 notebooks on the 12 or so inventors that they  
22 were ordered back in August to produce on the  
23 malonic acid and maleic acid patent  
24 applications? We do not have those and they

1 claim they're nonresponsive because in their  
2 view they're not relevant. We clearly made them  
3 relevant.

4 I thought I heard counsel to be  
5 talking just about the 17 documents and that's  
6 what he was referring to. He said they're going  
7 to produce three. So there's 17 of those plus  
8 the lab notebooks of the inventors. So it's  
9 certainly way more than three so I'm concerned  
10 by the --

11 THE COURT: How many inventors are  
12 there that you feel that the lab notebooks are  
13 still lacking for?

14 MR. PAUNOVICH: So we've gotten  
15 lab notebooks from Kimberly Dreher Hamilton.  
16 I'm not going to name all of them, but I know  
17 that I can get that in the space of this  
18 hearing. But there are 12, Kimberly Dreher  
19 Hamilton, Fabian Boulineau, Caroline Goget,  
20 Jeremy Puco, Gerard Provot, Dariusz Danielwski,  
21 Anthony Potin, Allison Chin, Michael DeGeorge,  
22 Mara Applebum, Mary Soliman, Ashley Figatner,  
23 Megan Pauker, Emanuel Appiah-Amponsah, each of  
24 these are in our discovery letter. But I know

1 the majority of those we have no lab notebooks  
2 from.

3 There are inventors on patent  
4 applications. The two that straddle on this key  
5 meeting we would like to have those.

6 MR. PALYS: Your Honor, I think we  
7 addressed this before. If we have a notebook  
8 that was relevant, we produced it.

9 Mr. Paunovich was giving a list of names but  
10 doesn't seem to know what was produced. Let me  
11 just give you an example, some of the list that  
12 he just identified doesn't have any notebooks.  
13 We've told this to them over and over. We  
14 cannot produce what we don't have.

15 We have done the research. If we  
16 found a notebook that was relevant, we produced  
17 it. If we didn't, it doesn't exist. So the  
18 only ones that we have found right now from the  
19 complaints that they are these three remaining  
20 that I don't believe are named inventors so I  
21 don't know what else to tell the Court.

22 THE COURT: Mr. Paunovich, do you  
23 want to address the --

24 MR. PAUNOVICH: The key question

1 is what's relevant. And we were told at the  
2 meet-and-confers that they don't deem the lab  
3 notebooks relating to the filing of these two  
4 patent applications as being relevant.

5 THE COURT: You're referring to  
6 the '625 and 663 patent applications?

7 MR. PAUNOVICH: Correct. So are  
8 we getting those? I don't think they should be  
9 hiding behind the relevancy determination that  
10 we're not able to make. So if we're getting  
11 those lab notebooks related to those two  
12 inventions, then I'm satisfied.

13 THE COURT: All right. Can you  
14 speak to those, Mr. Palys?

15 MR. PALYS: Your Honor, if we  
16 don't have a notebook, we don't have a notebook.  
17 That's the response. When I was referring to  
18 relevancy, that was in the context of Her  
19 Honor's discussion back in August, in other  
20 words, if it has nothing to do with the accused  
21 products, then that would not be considered  
22 something relevant.

23 In other words, when we're  
24 redacting a notebook, a formulator or some

1 chemist is working on some other project, we  
2 will redact it. That's what I was referring to.  
3 I don't know what else to say. We produced what  
4 we could find to the extent it was directed and  
5 relevant to this case.

6 MR. PAUNOVICH: Are we getting  
7 the --

8 THE COURT: I think I can put this  
9 to rest. I'm going to order a supplemental  
10 production of lab notebooks to the extent they  
11 exist even if those lab notebooks are addressing  
12 the '625 and the '663 applications. I think  
13 that there's a sufficient record made here and  
14 the basis for that given that Plaintiffs  
15 described in their moving submission that those  
16 applications both describe hair treatment  
17 compositions and shows L'Oreal's transition from  
18 malonic acid to maleic acid.

19 So to the extent there's some  
20 withholding, I'm not saying that there has been  
21 because I truly don't know, but if lab notebooks  
22 have been held on relevancy as relating to these  
23 two patent applications as opposed to  
24 patents-in-suit, then I would ask that L'Oreal



1 go back and make a production of them.

2 And if there's some issue still  
3 with regard to producing them to the extent they  
4 exist, I will hear it. If there are still  
5 relevancy objections and reluctance to produce  
6 them on that basis, we will have to find some  
7 other process going forward either by a  
8 declaration from some expert that brings the  
9 relevance to light for the Court and/or an  
10 in-camera review of them by the Court or  
11 whatever, but there has to be a means to get to  
12 the end.

13 For right now I will order the  
14 production. To the extent they exist not to be  
15 excluded on the basis that they relate to the  
16 '625 and '663 applications, that won't be a  
17 sufficient relevancy objection, so that should  
18 clarify.

19 MR. PAUNOVICH: Thank you, Your  
20 Honor.

21 THE COURT: The next issue for  
22 L'Oreal.

23 MS. MURRAY: Your Honor, I think  
24 we're moving into the interrogatories on our

1 end. So we would like a response to  
2 Interrogatory No. 13. We believe the response  
3 is incomplete. We want to know how their  
4 product and any derivation was created made to  
5 use. This goes to many issues in the case.

6 It can go to invalidity. It can  
7 go to when there was public use of the product.  
8 It can go to claim construction. We should have  
9 a right to know what's in their product. And  
10 all they say is, well, you're going to get the  
11 information because you've subpoenaed the  
12 manufacturer.

13 Well, the manufacturer gave us  
14 very little information and the manufacturer is  
15 telling us that they're not available for  
16 deposition. So we're asking the party, the  
17 party who should know how their product is made,  
18 can you tell us and explain that process.

19 All we really got from the  
20 interrogatory response was a list of ingredients  
21 and it basically just refers us to their  
22 manufacturer which is kind of a dead-end because  
23 they're not responding to our subpoena. And  
24 with respect to documents, they gave us invoices

1 and communications but not the information that  
2 we've requested. It seems like a kind of  
3 straight-up request, but they don't want to give  
4 us information about their product.

5 THE COURT: Mr. Paunovich?

6 MR. PAUNOVICH: Your Honor, we  
7 think that this interrogatory is not  
8 proportionate to the needs of the case. They're  
9 asking for literally every potion that might  
10 have ever been created relating to our  
11 commercial product.

12 What's in our commercial product,  
13 much less some other earlier version of it is  
14 not relevant to any claim or defense in this  
15 case and calls for potentially, incredibly  
16 lengthy and burdensome narrative about how we  
17 bottle a product. It's very confusing to me why  
18 or how that would bear on the validity of our  
19 patent.

20 On how we mix it, where do we buy  
21 our ingredients from, how is this relevant to  
22 any claim or defense in this case. It has no  
23 relevance to invalidity. We're talking about a  
24 separate patent that covers a different active

1 agent as the parties have talked about and  
2 explained. And how that bears on validity is  
3 lost on us.

4 This seems to be sort of a make-  
5 work exercise that's going to serve no purpose  
6 in this case. They are deposing our inventors  
7 for whatever little knowledge that they may have  
8 and essentially every employee that works at  
9 Olaplex, by the way which is a very small  
10 company still, and they designated topics  
11 relating to the manufacturer of our products.  
12 They have an opportunity to depose these people.

13 I'm not saying it's relevant to  
14 anything, but somebody will be there and they  
15 can answer whatever information that they have.  
16 I think our papers lay out very clearly why the  
17 information called for by this interrogatory is  
18 neither relevant to validity or to public use,  
19 and L'Oreal is just insisting, well, you've got  
20 to respond to this. There has to be some limit.

21 We have been dumped on a huge  
22 amount of discovery from L'Oreal in the last  
23 month. After two years of litigation, they  
24 decided to serve over 20 subpoenas or deposition

1 notices, 120 document requests, nearly every  
2 single one of their interrogatories -- there has  
3 to be some limit here, especially when it has no  
4 bearing or relevance in this case. Unless Your  
5 Honor has any questions?

6 THE COURT: No questions.

7 MR. PALYS: Your Honor, if I can,  
8 let me enlighten the Court on that. Maybe  
9 Mr. Paunovich doesn't know the relevance here.  
10 Your Honor, remember when we had this claim  
11 construction argument a few weeks ago and we  
12 were talking about their representation that  
13 their product isn't covered, we have a right to  
14 know what's in their product, how it's made.

15 In other words, are they using  
16 maleic acid that eventually transforms into some  
17 other compound. We have a right to know that  
18 because it goes to the disclaimer. Validity,  
19 Mr. Paunovich has no clue on how that happens.  
20 It's prior use.

21 Their story is they came up with a  
22 formulation in a garage on a certain date and  
23 then from there, it transformed into something  
24 that's Olaplex. We're entitled to know what was

1 in those formulations that they were handing to  
2 stylists years before they filed the patent  
3 application because it goes to prior use.

4 Priority can be attacked from the  
5 patent application so it does make it relevant.  
6 So, yes, we are asking for every iteration of  
7 every portion that they had come up with, and we  
8 think it's very relevant to this and they should  
9 be compelled to produce documents and notes.

10 My last point here, Your Honor, is  
11 if they're going to say that they don't have  
12 anything or they don't know how their process is  
13 made, that's on them. But they can't come into  
14 trial and try to explain something different.

15 THE COURT: I hear what you're  
16 saying and I think we're dealing with two  
17 different issues here. Any issue that comes up  
18 at trial is considered "sandbagging" if the  
19 initial discovery has not been provided. That's  
20 something that you're going to address with the  
21 trial judge and presumably object to exclude, et  
22 cetera.

23 What we're dealing here with is  
24 information that you're looking for about how

1 their product is created and --

2 MR. PALYS: Previous derivations,  
3 the development to it.

4 THE COURT: And I understand  
5 you're asking for all iterations. But I'm  
6 trying to grasp how that can possibly be  
7 answered in the form of an interrogatory. Is it  
8 a better process for you to go forward with  
9 these depositions with the various individuals  
10 who may have knowledge of a part or all in the  
11 best-case scenario or at least different pieces  
12 of it and if you feel that there is still  
13 something missing, then that becomes a more  
14 narrow and not such a broad category for a  
15 response that you're seeking?

16 MR. PALYS: I agree with you.  
17 And, yes, we're going to ask those questions.  
18 But we think that shouldn't prevent them or  
19 preclude them from putting it in writing as  
20 well. How can they write this? They can tell  
21 us what was in the alleged formula, what was in  
22 the bottle, what was the concentration, what did  
23 you give the stylists when they were testing it,  
24 what was contained in there, because this is

1 information that we're getting the run-around on  
2 since the beginning of this case.

3 Many of the stylists and I don't  
4 think we're talking about them today, but none  
5 of the stylists are available for depositions,  
6 all of them, you heard that today. So we can't  
7 get to the meats and bones of any of their  
8 formulas. We had deposed Dr. Pressly, one of  
9 the inventors, on this issue way back in the  
10 beginning of the case. And he made it very  
11 clear, I don't keep notes; I keep everything in  
12 my head in terms of production and stuff like  
13 that.

14 So if Olaplex has a product that  
15 it's putting out and they don't know, number  
16 one, in their current product how it's made and  
17 they're pointing us to go to the manufacturer to  
18 figure out, if that's going to be their  
19 position, then it should be absolutely clear  
20 that that's their position, we don't know how  
21 our product is made.

22 And in terms of the previous  
23 development of those products which goes to the  
24 relationship of their asserted infringement



1 claims, if they don't know what was in there,  
2 now we're talking about conception and reduction  
3 to practice issues, so it's very relevant. And  
4 we think they should put it in an interrogatory  
5 response.

6 And then the time limit of all of  
7 the topics on this deposition, they're putting  
8 up Mr. Pressly for a lot of topics and we have  
9 seven hours with them. Will we be able to get  
10 that from them -- oh, no, they're not giving us  
11 a witness on this topic. I just found that out,  
12 so we won't have that opportunity.

13 MR. PAUNOVICH: Your Honor, our  
14 witnesses have been deposed already and early on  
15 in this case it had been asked, they have always  
16 used what this bis-aminopropyl diglycol  
17 dimaleate, this is what they testified that has  
18 been used from Day 1. Now, apparently L'Oreal  
19 wants us to go back and describe, you know, I  
20 had a liter here and a liter there and I put it  
21 in this-shaped bottle and then later we switched  
22 to this bottle. What are these issues relevant  
23 to? They're not relevant to anything here.

24 And as Your Honor said, they're

1 going to have an opportunity to depose our  
2 inventors, essentially almost every single  
3 employee of Olaplex. Let's keep in mind, this  
4 was a garage start-up. To this day, it has no  
5 brick and mortar building. We don't have  
6 machines that mix and do these things. We have  
7 a supplier that does all of these things.

8 They made it originally with the  
9 same ingredient. They testified to that. It's  
10 never been changed. Your Honor, maybe it will  
11 be obviated in short order whenever Your Honor  
12 issues her claim construction order, but this is  
13 that concentration term. Do you measure  
14 concentration when by referencing the ingredient  
15 that you add to the solution or do you assess it  
16 at some indeterminate time in the future. That  
17 is this issue.

18 If Your Honor rules in our favor  
19 on that particular claim construction, then this  
20 is an absolutely dead issue and makes this  
21 discovery even more futile and pointless to the  
22 claims and defenses in this case.

23 MR. PALYS: Your Honor, one other  
24 point. That's not true. It's not the mixture

1 issue. It's prior use issue. If their product  
2 was disclosed prior to the date that it is  
3 available for prior art, it's prior art. Thank  
4 you.

5 THE COURT: I'm going to grant  
6 L'Oreal's request and order to compel Olaplex to  
7 answer Interrogatory No. 13. How much time is  
8 reasonable for that?

9 MR. PAUNOVICH: So next week we  
10 have over 20 depositions occurring on Monday.  
11 There's five alone. All of the team members are  
12 fully deployed other than some of these limited  
13 document production, so I would request that we  
14 be able to provide this response after the  
15 close-of-discovery which will also take  
16 advantage of the deposition testimony that will  
17 likely be given.

18 I just don't know honestly that  
19 we're in a position to do that any sooner, but  
20 we would do it expeditiously and very quickly  
21 after that.

22 THE COURT: And the depositions  
23 may have some bearing on the fashioning of the  
24 responses of the interrogatory. Will they all

1 be completed by the end of next week?

2 MR. PAUNOVICH: Yes.

3 THE COURT: So if I order it one  
4 week subsequent to that?

5 MR. PAUNOVICH: Yes. Thank you,  
6 Your Honor.

7 THE COURT: My order is that a  
8 response to Interrogatory No. 13 be provided one  
9 week after the conclusion of next week's  
10 depositions, so that will make it December 28th.

11 All right. We have two additional  
12 issues from the Plaintiffs. There's the  
13 deposition date issue and document hold and  
14 preservation and --

15 MR. PAUNOVICH: Yes, Your Honor.

16 THE COURT: Before you get into  
17 your argument, Mr. Paunovich, in trying to move  
18 things along because we're getting short on  
19 time, with regard to this, the Court's default  
20 order never really compels a party to provide  
21 this type of information that you're seeking.  
22 So what would make it ripe for an exception to  
23 the default standard?

24 MR. PAUNOVICH: Your Honor, I

1 think that the testimony and exhibits that we  
2 used with Mr. Dolden make this a clear  
3 exception, an exception that this Court as well  
4 would typically look at for providing this type  
5 of information.

6 THE COURT: Aren't you putting the  
7 cart before the horse? Doesn't the Court have  
8 to make a finding that evidence has not been  
9 preserved or has a spoliation issue here before  
10 I even get to the relief that you're seeking?

11 MR. PAUNOVICH: We tried to tee  
12 that up, Your Honor, in our discovery dispute  
13 letter. If Your Honor would like more briefing  
14 on that issue to flush it out a little bit more  
15 given all of the issues here, we can certainly  
16 do that.

17 But in essence, Mr. Dolden, the  
18 lead for this potential acquisition of Olaplex,  
19 testified that essentially they anticipated  
20 litigation all the way back in 2015. And he  
21 also testified that L'Oreal has document  
22 destruction practices, as large corporations  
23 typically do, and there was no document hold  
24 notice issued to him or anyone else on the team

1 that he led at that time when they anticipated  
2 litigation.

3 So we have now all the  
4 foundational facts to know that, look, you  
5 anticipated litigation, you have document  
6 destruction policies that if they're not ceased  
7 or put on hold, that documents are going to get  
8 destroyed.

9 What we don't know is, okay, when  
10 did you issue your first document hold notice  
11 and what was the nature of that first document  
12 hold notice. So when is an important fact and  
13 that might otherwise appear on a privilege log.  
14 But we think just as importantly is the  
15 substance of that document hold notice.

16 Were people told to just maintain,  
17 for example, things relating to perhaps a narrow  
18 reading of the Olaplex acquisition or were they  
19 asked to maintain things also relating to the  
20 development of the accused products. Each of  
21 those twin towers of this case, we think, would  
22 have relevant information.

23 We've got witnesses who swear on  
24 our side to providing all of this confidential

1 information to the other side, and one guy is  
2 saying, no, we never got anything. Yet all over  
3 his documents he's saying, I think we're going  
4 to get sued, I'm very concerned. I'm  
5 uncomfortable with this and admitting that  
6 there's no document hold notice.

7 We do recognize that it is a rare  
8 exception, but we think the foundational facts  
9 are laid here supporting the Court's ruling to  
10 provide this information.

11 THE COURT: All right.

12 Ms. Murray?

13 MS. MURRAY: Your Honor, I think  
14 you're right here, there hasn't been any  
15 findings of spoliation. Mr. Paunovich has taken  
16 Mr. Dolden's testimony out of context. If he  
17 was asked if there was a litigation hold notice  
18 issued when he sent this email, it was him  
19 giving his thoughts to the CEO. And when he was  
20 asked was there a litigation hold issued, he  
21 said, I don't think so and I don't know a reason  
22 why there would be. There wasn't a situation  
23 where there was a company who's feeling that  
24 they were going to be sued.

1 In any event, Your Honor, as  
2 Mr. Paunovich has just acknowledged, all over  
3 Mr. Dolden's documents there are emails about  
4 this acquisition. All of these emails went  
5 before this September 5, 2015 day that they're  
6 saying it should have cleared a hold notice.  
7 The documents produced relating to the  
8 acquisition go all the way back to the beginning  
9 of the talks with Olaplex, early 2015. February  
10 2015 is when the decisions were made to start  
11 having these talks. They have all been  
12 produced.

13 And prior to that all of the  
14 technical documents date back to 2014, so I'm  
15 not sure where there's a concern that something  
16 is missing. Again, this does not allow you to  
17 accuse a company of spoliation, so this seems  
18 premature.

19 MR. PAUNOVICH: Your Honor, does  
20 Mr. Dolden that they now say, well, this is just  
21 one guy's opinion, this is the guy that they  
22 want to designate after the fact as a 30(b)(6)  
23 for the company that they supposedly didn't  
24 receive this document, who is not part of the



1 clean room by his own acknowledgement.

2 There's ironic tension in my view  
3 in that position. This is the executive vice-  
4 president who says he managed the whole thing,  
5 who says, I anticipated litigation and he puts  
6 it in writing and says, there's document  
7 destruction policies and we didn't issue a hold  
8 notice. So I don't know how you can get closer  
9 to demonstrating that there is a potential  
10 spoliation here.

11 If we don't see a hold notice  
12 until 2016 when we first sued them, that's a  
13 long time for a corporate company who's  
14 destroying documents on a one- or two-month or  
15 whatever it may be basis. I'm sure we've got  
16 some things, but what don't we have.

17 I think like in all trade secrets  
18 cases, you never have the smoking gun. It is  
19 always circumstantial evidence. And to the  
20 extent that things have been destroyed, we would  
21 like to inquire into that and we may ask the  
22 judge, our trial judge in this case, to issue an  
23 instruction relating to that. We need this  
24 information in order to be in a position to make

1 that request to the Court.

2 THE COURT: At this time, I'm  
3 going to deny the request. I just feel that  
4 there isn't a sufficient basis for the Court  
5 here to assume potential spoliation and then go  
6 to the next level and carve out an exception for  
7 production of documents. That will clearly be  
8 an exception to our default standard for  
9 discovery.

10 I'm not saying that I'm not  
11 listening to your argument. I'm just saying on  
12 this record I'm not comfortable making that  
13 exception today. And it sounds like this issue  
14 may be wrapped in with the 30(b)(6) designation  
15 after the deposition that you have previewed me  
16 may be an issue coming before the Court in  
17 another matter for another day. Perhaps this  
18 issue is part and parcel with that.

19 I will deny it without prejudice.  
20 Today I won't grant the request for compelling  
21 documents and communications relating to  
22 L'Oreal's document destruction and retention  
23 policies at this time.

24 I think the next issue is the

1 deposition scheduling issue or are we still on  
2 L'Oreal's interrogatory responses?

3 MS. MURRAY: Yes, Your Honor.  
4 Interrogatory No. 15 is related to the No. 13,  
5 so this one asked for all bases for their  
6 position that their products are not covered.  
7 And in anticipating your question of why don't  
8 we just ask that in a deposition, we did put it  
9 in our 30(b)(6) witness. They've identified who  
10 they plan to produce. They will not produce a  
11 witness on this topic.

12 THE COURT: Well, I always try to  
13 figure out in my own mind where that line is  
14 drawn between factual testimony and expert  
15 witness testimony and foundational facts on  
16 which an expert needs to rely in order to give  
17 an opinion. Shouldn't we defer this until after  
18 expert exchanges have been made?

19 MS. MURRAY: None of the factual  
20 witnesses have testified that the products are  
21 not covered, so we would like the basis to  
22 understand the basis for them saying that. All  
23 we're asking for is why are you saying that and  
24 what are you relying on. They say that's very

1 early in the case.

2 We're not looking for the expert  
3 testimony. That can come later, but the basis  
4 for the factual witnesses' testimony that the  
5 products aren't covered. And Mr. Palys just  
6 reminded me they made these representations to  
7 the Fed Circuit, so this is prior to expert  
8 discovery. All we're saying is, what are those  
9 representations based on. Please put it in into  
10 an interrogatory.

11 THE COURT: Mr. Paunovich?

12 MR. PAUNOVICH: Your Honor, this  
13 is expert contentions. This is back to that  
14 concentration term claim construction for better  
15 or for worse.

16 THE COURT: All right. I'm going  
17 to deny the motion to compel Olaplex to respond  
18 Interrogatory No. 15. I think there are a  
19 number of ways to obtain what it is that L'Oreal  
20 is seeking here. First off, I think it is in  
21 the realm of expert testimony and we certainly  
22 have avenues of relief if you believe once those  
23 expert exchanges are made in the form of the  
24 reports exchanged and then expert depositions.

1 If you feel you have a basis for a  
2 *Daubert* motion after doing that if there's not  
3 sufficient facts to support it or if Olaplex  
4 brings in facts and evidence, documents, et  
5 cetera, that were not previously disclosed in  
6 discovery, you have avenues of relief, but I  
7 don't see how this can be more fully developed  
8 without expert exchanges.

9 MR. PALYS: Can I comment?

10 THE COURT: Go ahead.

11 MR. PALYS: The problem we have  
12 with this is that they have told the PTAB, they  
13 have told this Court, they've told the Federal  
14 Circuit without expert testimony that their  
15 product isn't covered, so why should we not be  
16 able to have access to what is their basis. If  
17 they did not have a basis when they made this  
18 representation to the Federal Circuit, the PTAB,  
19 we should be able to know that as well.

20 THE COURT: Well, haven't these  
21 witnesses been asked in your depositions what's  
22 your basis for that, for making that statement?

23 MR. PALYS: This is the  
24 representation by Olaplex the company.

1 Ms. Walden has made that representation. I  
2 believe she was asked that and I can't remember  
3 if we followed up with the reasons. We believe  
4 we have a right to ask that question and have  
5 them answer it in an interrogatory and in a  
6 deposition.

7 By precluding them to answer this  
8 in an interrogatory and then not providing a  
9 witness, we're completely barred from  
10 understanding their factual representation and  
11 basis for telling the Federal Circuit, the  
12 public, the PTAB and this Court that their  
13 product is not covered. And as you know, it's a  
14 big issue in this case. It's a very big issue  
15 in this case and we think that the Court would  
16 benefit from that insight as well as the parties  
17 and the public for that matter. It is their  
18 patents on this. It's a very important issue,  
19 Your Honor. Thank you.

20 THE COURT: You can respond  
21 briefly.

22 MR. PAUNOVICH: I don't think it  
23 warrants any further response. We think Your  
24 Honor has it right.

1 THE COURT: At this time, I'm not  
2 going to compel it. Again, I believe it's in  
3 the realm of expert testimony. Attorneys take  
4 positions in litigation all the time and that's  
5 why we have litigation to test the truthfulness  
6 or the correctness of what position is  
7 ultimately going to prevail.

8 In terms of whether or not  
9 Olaplex's product is or is not covered by the  
10 asserted patent, that's going to be one of the  
11 issues litigated aggressively here and has been  
12 litigated aggressively here. I think that  
13 you're not prejudiced by not having it answered  
14 at this point.

15 I think it's more appropriate to  
16 go into the realm of expert discovery. And if  
17 you want to come back and keep pressing for an  
18 answer to Interrogatory No. 15 or if you want to  
19 take further action such as a *Daubert* motion or  
20 other request for relief after expert reports  
21 are in, there are avenues to pursue this. At  
22 this time, I'm not going to compel an answer to  
23 Interrogatory No. 15.

24 MR. PAUNOVICH: The last issue in

1 Plaintiffs' discovery dispute relates to  
2 deposition dates, Your Honor. There's been  
3 extensive meet-and-confers so I don't want to  
4 suggest that that hasn't been the case.  
5 Ms. Murray, my colleague and myself among others  
6 have been doing that.

7 The three individuals that we  
8 called out, what I understand and I will just  
9 ask counsel to correct me if this is not  
10 accurate of the current understanding, is that  
11 Caroline Goget, who used to be a L'Oreal USA  
12 employee in some time in the recent past, has  
13 now been transferred to L'Oreal SA in this sort  
14 of shuffling that occurs, and they are going to  
15 agree to put her up in addition to possibly  
16 Delphine Allard or whichever SA employee will be  
17 put up for deposition in connection with the  
18 letter request provided what they told us they  
19 said they'll do that, provided Judge Bataillon  
20 denies their objections to the Court's order.

21 So with that understanding, I  
22 think that would be obviated, although it's  
23 unclear when we would get those depositions.  
24 I'm a little concerned that there's an existing



1 order that should be applied absent an objection  
2 being sustained, and they're not going to do  
3 that until some time later. If the Court is  
4 okay with that, we'll take the depositions  
5 whenever we get them.

6 THE COURT: How about the other  
7 two?

8 MR. PAUNOVICH: The other two they  
9 had indicated to us that they represent them and  
10 accepted service of our subpoenas. But then  
11 we've never gotten dates. We sort of waived the  
12 white flag the other day and we sent out other  
13 subpoenas to serve them directly. We were  
14 successful with Mr. Pucio but not yet with  
15 Ms. Morris. If they represent them and  
16 previously accepted service, we would simply ask  
17 that their depositions be set. That's it.

18 THE COURT: All right.

19 MR. PAUNOVICH: Thank you.

20 THE COURT: Can we get depositions  
21 of these other two -- let's start with the two  
22 that are not subject to the objections on the --

23 MS. MURRAY: Sure. We never  
24 accepted service for these people. They're not

1 L'Oreal employees. So they're former L'Oreal  
2 employees. What we said is that L'Oreal was  
3 going to offer to represent them as it does  
4 every time there's a former employee. My  
5 understanding is that Olaplex is going to  
6 subpoena them, so they are in the process of  
7 doing that.

8 We will work to get their dates,  
9 but I believe one of them has not been  
10 subpoenaed yet. We don't control them. We  
11 don't have authority to accept service for them,  
12 but we will arrange their dates if and when  
13 they've been served and try to work with them.

14 Ms. Goget, she wasn't transferred  
15 to SA. She's a L'Oreal SA employee. She was on  
16 the road at the time at USA. What we've offered  
17 to them because given the time constraints  
18 because she is in France and there's procedures  
19 for that, we're not going to force them to go  
20 through a new letter of request for process  
21 given the time.

22 What we said is we will rope that  
23 in -- if they get to The Hague, they can seek  
24 it. We haven't made representations about

1 anything, any other witnesses there. We've  
2 identified witnesses like Ms. Goget on our  
3 initial disclosures. We've identified  
4 Ms. Allard on our initial disclosures. They  
5 have to go through the process. There's nothing  
6 we can do on that. We're not withholding  
7 witnesses.

8 We've got a host of third-party  
9 witnesses, Your Honor, that we have been trying  
10 to depose and we're getting no response from.  
11 There are a lot of stylists, for example. When  
12 I talked to Olaplex's counsel about whether they  
13 were going to appear on behalf of these people,  
14 they said let me check.

15 The next thing I know I get a call  
16 from a new lawyer saying, I represent all of  
17 these stylists. I said, who do you represent.  
18 She said, all of these people on this list.  
19 It's about six stylists in Chicago,  
20 Philadelphia, Los Angeles. None of them are  
21 available before your discovery cut-off. That  
22 was the response I got.

23 I said, well, how do you know what  
24 discovery cut-off you have. She also told me

1 that she hasn't spoken to all of these stylists,  
2 but she understands that she represents them.  
3 Her only representation to me is none of them  
4 are available.

5 I said, we have a discovery  
6 cut-off but we can try to be flexible with  
7 respect to third parties, and we will seek  
8 relief from the Court. We just need some  
9 guidance on how we're going to get these third  
10 parties, which we have strong suspicion they're  
11 being controlled by Olaplex in order to retain  
12 counsel to tell me that none of them are  
13 available before the discovery cut-off.

14 We are willing to be flexible and  
15 take some of these third-party depositions  
16 whenever these people are available.

17 THE COURT: I think I have a  
18 solution for this unless you have further  
19 comment.

20 MS. MURRAY: No. I mean, there's  
21 more. Their manufacturer is not available for  
22 deposition. Even though on our end, the third  
23 parties that they have subpoenaed on our end  
24 that are affiliated with L'Oreal, one went

1 yesterday. They were available and they were  
2 deposed. Another one is going next week. We're  
3 not hiding witnesses. We're just having  
4 difficulty getting these scheduled.

5 THE COURT: What I was going to  
6 suggest is specifically with regard to Caroline  
7 Goget, I think that it is properly put in  
8 abeyance until Judge Bataillon rules on any  
9 objections to my ruling on The Hague Convention.

10 With respect to the other  
11 witnesses who are not within the control of  
12 L'Oreal to the extent that L'Oreal can confirm  
13 and accept process for them to be available for  
14 deposition, I think the parties need to figure  
15 out who that category of witnesses is.

16 And if you need a written court  
17 order because you're getting the run-around from  
18 third parties who won't commit, just get  
19 together and either submit a joint form of order  
20 or submit each of your proposals if you can't  
21 agree on a joint form of written order and I  
22 will enter an order that says on or before X  
23 date, these depositions of these witnesses shall  
24 take place and the parties are willing to work

1 with the witnesses to do it in a mutually  
2 convenient time. But absent cooperation from  
3 the parties, the Court will designate deposition  
4 dates for them and they will be compelled to  
5 appear or otherwise the Court should find that  
6 they are in civil contempt or something to that  
7 effect.

8 MR. PAUNOVICH: Just one quick  
9 point, Your Honor. I'm not sure how we hijacked  
10 this topic to a bunch of third parties, but  
11 putting that aside, we noticed these people back  
12 on November 7th and we were told that Paul  
13 Hastings was representing them and would accept  
14 service. Here nor there we're trying to get  
15 them in before the discovery cut-off.

16 We have an extremely compacted  
17 schedule right into expert discovery on January  
18 11th. L'Oreal has served over 25 deposition  
19 notices or subpoenas in the last two to three  
20 weeks. We don't represent them. I wasn't part  
21 of the conversations that counsel has said  
22 occurred.

23 It sounds like most of these  
24 people are well outside the District of Delaware

1 and aren't even represented by counsel here in  
2 Delaware, so that's another issue for another  
3 day. What I'm talking about right now are these  
4 three people that we're asking about. I guess  
5 if counsel is no longer representing them, then  
6 we will call these people on the phone and speak  
7 with them ourselves.

8 We've been hesitant to do that  
9 because of the representation that they're  
10 representing them and --

11 THE COURT: Has that been  
12 represented in writing? Have you sent a letter,  
13 Ms. Murray, to Mr. Paunovich or the attorneys  
14 for the other side indicating -- how can we get  
15 these people deposed? Either they get  
16 subpoenaed or they don't. Either you produce  
17 them or you don't.

18 MS. MURRAY: We don't have  
19 authority to accept service on behalf of a  
20 former employee. If and when they're served,  
21 one of them has been served, we will offer to  
22 provide counsel and represent them at their  
23 deposition. We will get from them the dates.  
24 Again, they have another job, they're working

1 somewhere else. But we didn't have authority to  
2 accept service.

3 I never agreed to accept service  
4 on behalf of people who are former employees. I  
5 don't have that authority, but we are offering  
6 to represent them. We assume they'll take us up  
7 on the offer, it's free counsel, and we will  
8 work to arrange their availability. That's the  
9 two witnesses.

10 THE COURT: So they may be  
11 defending them at deposition, Mr. Paunovich, but  
12 they can't facilitate the scheduling of those  
13 depositions.

14 MS. MURRAY: We can facilitate the  
15 scheduling. So we'll talk to them and say, when  
16 are you available. Once they've been served,  
17 when are you available and we'll work on the  
18 schedule and we will work with them on that  
19 schedule. We have no problem doing that. We're  
20 not getting that same cooperation on their third  
21 parties.

22 THE COURT: Well, that's another  
23 matter for --

24 MR. PAUNOVICH: I don't represent



1       them.

2                   THE COURT:   With these two  
3       witnesses that you want, subpoena them and I'm  
4       presuming you have good addresses --

5                   MR. PAUNOVICH:   Well, I'm just  
6       going to reach right out to them.   If they're  
7       not currently representing them, I'm free to  
8       reach out to any third party that I want and  
9       call them, so that's what we'll do and try to  
10      make sure they get served.   And if they become  
11      representative in the future, we will speak to  
12      their counsel.

13                  THE COURT:   All right.   That's the  
14      plan.

15                  MS. MURRAY:   I have serious  
16      concerns regarding these stylists where I got a  
17      call from a lawyer who tells me she has a list  
18      of names from Olaplex and she now represents all  
19      of them all across the country and yet they're  
20      telling me that they don't control these  
21      stylists.

22                  THE COURT:   Well, that's something  
23      that is the subject of a meet-and-confer.   I  
24      don't know that I have enough information to go

1 down that path today. As I said, if it would  
2 assist the parties to have a court order to the  
3 extent certain witnesses are agreed to be  
4 third-party witnesses that one side or the other  
5 doesn't control notwithstanding suspicions  
6 aside, I will enter an order, any order that you  
7 get over to me, to put some teeth in the  
8 requirements for counsel that is not involved in  
9 the litigation who may be representing them that  
10 they know the time-sensitivity of getting these  
11 depositions on record and the seriousness with  
12 which the Court takes this application to have  
13 them deposed.

14 MS. MURRAY: We appreciate that.  
15 Thank you, Your Honor.

16 MR. PAUNOVICH: Your Honor, if I  
17 may, I just have one point because we're going  
18 to end up meeting and conferring about this.

19 THE COURT: Sure.

20 MR. PAUNOVICH: The Court ordered  
21 100 hours of deposition in this case. We've got  
22 no less than literally five depositions a day or  
23 a lot that are occurring next week. L'Oreal has  
24 38 hours of deposition time left in this case,

1 and we've got it sounds like dozens of possible  
2 deponents.

3 At some point we're going to have  
4 to come back to this Court. There has to be  
5 reasonable limits which the Court set in this  
6 case already. They've chosen to depose people  
7 two or three times and spend all day long  
8 deposing people. At some point even with all of  
9 these third parties, we would just simply ask  
10 that the Court take that into consideration that  
11 there will be a time when their minutes run out.

12 THE COURT: Well, if there's an  
13 application to expand deposition limit time from  
14 either side or a joint stipulation to that  
15 effect, I will certainly consider it.

16 I think that covers all of  
17 Olaplex's issues; is that correct,  
18 Mr. Paunovich?

19 MR. PAUNOVICH: Yes, Your Honor.

20 THE COURT: We have more  
21 interrogatory responses at issue.

22 MS. MURRAY: I'm going to try to  
23 lump them together so we can keep them quick,  
24 Your Honor. Some of these they'll answer part

1 of an interrogatory; these are Interrogatory  
2 Nos. 11, 14, 17 and 18. They answer some of it,  
3 but they don't really answer the question.

4 For instance with Interrogatory  
5 No. 1, we want them to describe all testing that  
6 was done with the accused products and they  
7 basically just point us to their infringement  
8 contentions and a declaration submitted by their  
9 experts. Well, what we were looking for is what  
10 investigation they had done prior to the lawsuit  
11 regarding the accused products and they haven't  
12 articulated that here.

13 On 14, we've asked for all of the  
14 underlying facts to support their claim that  
15 their bond multiplier rebuilds glycol -- they  
16 basically provided a theory that they have and  
17 that's it. On some of these if their position  
18 is they don't have more information, then we're  
19 going to have to accept that. But it seems like  
20 they're not giving us a full response to the  
21 interrogatories and just cherry-picking one part  
22 of it to respond.

23 THE COURT: The problem is you  
24 haven't real cabined or outlined for me a

1 specific deficiency. It's coming across to me  
2 in the way I've read -- and I understand that  
3 the parties are limited in what they can write  
4 about in these papers with the page limits, but  
5 it sounds like it's more of a case of I don't  
6 like the answer I'm given as opposed to this  
7 answer doesn't meet the requirements of  
8 responding to an interrogatory under the Federal  
9 Rules of Civil Procedure.

10 It's a little bit hard for me as a  
11 judge when it's more of a subjective I don't  
12 like this answer to enter into any fashion in  
13 any way any relief on that point.

14 MS. MURRAY: I understand, Your  
15 Honor. If we just look, for example, at  
16 Interrogatory No. 11, we asked for testing of  
17 the accused products. We wanted to know who was  
18 involved in the testing, the date of the testing  
19 and the testing that was performed.

20 We didn't get any identification  
21 of people or when the testing was. It was see  
22 our infringement contentions and the  
23 declaration. So what we would like on that one  
24 is an identification of the people involved in

1 the testing and the date of the testing and the  
2 details of the testing.

3 THE COURT: Mr. Paunovich, can  
4 that be provided?

5 MR. PAUNOVICH: No, Your Honor.  
6 The information they're asking for would be  
7 privileged, our presuit investigation of the  
8 accused products. And to the extent that  
9 they're saying this is like a back door Rule 11  
10 challenge, I think through the pendency we've  
11 demonstrated and then some that we have a  
12 sufficient basis on which to bring suit, so I'm  
13 not sure to what end that this is necessary.  
14 And in any event, our presuit investigation  
15 would absolutely be privileged.

16 We are going to be logging  
17 communications amongst counsel that are presuit.  
18 Beyond that, we're not going to be in a position  
19 to produce anything.

20 THE COURT: All right. Anything  
21 further, Ms. Murray?

22 MS. MURRAY: On that one, Your  
23 Honor, we're not asking for privileged  
24 information, but anything else that we think

1 we're entitled to. It's not like we don't like  
2 their answer. It's that they haven't provided  
3 any answer. Do you want me to stop there? I  
4 can do the other ones.

5 THE COURT: What about  
6 Interrogatories 17 and 18? They relate to  
7 deposition --

8 MS. MURRAY: 17, the ingredients,  
9 chemical structure, composition prior to the  
10 first launch of their product. So this is kind  
11 of related to the other ones about first use,  
12 prior use and they're not giving us a witness  
13 and they're not telling us here, so how do we  
14 get the information. That shouldn't be  
15 privileged. So we should be able to get that  
16 for Interrogatory 17. The answer doesn't give  
17 us the information that we're asking for.

18 MR. PALYS: If I can expand on  
19 what Ms. Murray was saying. Specifically,  
20 Interrogatory 17 states prior to first launch so  
21 we're talking before launch of the product. And  
22 in their response in one instance, they give a  
23 list of -- they say the results for summarizing  
24 the following table which is on Page 56 of their

1 response, and it looks like this. This exact  
2 table was in the prosecution history. That's in  
3 2015. That's after their product launched so  
4 it's nonresponsive to what we're asking.

5 MS. MURRAY: And 18, Your Honor,  
6 we wanted to know what else was involved prior  
7 to the first launch. We're wanting stuff before  
8 the first launch of the product and we're just  
9 not getting that information. That's not  
10 expert. That's not privileged and they're not  
11 giving us the witnesses.

12 MR. PAUNOVICH: Your Honor, this  
13 is frustrating because we have dispute letters  
14 in order to try and distill arguments and I'm  
15 trying to do things on the fly, I don't even  
16 have the interrogatories in front of me. I  
17 really do think this is an example of them just  
18 simply not liking our responses.

19 We've tried to provide as fulsome  
20 responses of nonprivileged information as we  
21 can. The interrogatories that they're  
22 referencing if you actually read them in whole  
23 they are much more extensive and have nuances  
24 and dips and details than is being suggested



1 here.

2 Frankly, the things we're doing  
3 right now completely on the fly are not -- I'm  
4 handicapped to be able to respond to that in  
5 realtime. I do think taking, for example, the  
6 ingredients, they deposed our people on these  
7 subjects. And they said, look, we have that  
8 really long name, bis-aminopropyl diglycol  
9 dimaleate. I'm happy, if we have the time, to  
10 pull out the interrogatories and we can go  
11 through them in detail, but this is sort of an  
12 ambush of now we want you to do this, and it's  
13 not even in their dispute letter.

14 MS. MURRAY: It is in our letter,  
15 Your Honor.

16 THE COURT: Here is what I'm going  
17 to do: I'm still of the mindset that this is  
18 more in the nature of a complaint of we don't  
19 agree and we don't like the answer we're given  
20 as opposed to what exactly is deficient.

21 I'm going to order that if L'Oreal  
22 wants to pursue more sufficient responses to  
23 these interrogatories at Issues 11, 14, 17 and  
24 18, that you specifically outline what it is you

1 want for Plaintiffs to provide that is not  
2 privileged that is responsive to these  
3 interrogatories, and then the Plaintiffs are to  
4 respond within a week of that letter, if not  
5 sooner.

6 So get a letter to them by Friday  
7 explaining the deficiencies. And this way I  
8 would have that letter, I would have the  
9 Plaintiffs respond if needed for a future  
10 discovery hearing and we will be able to go  
11 forward on that basis.

12 With respect to Mr. Paunovich's  
13 comments to Interrogatories 11 and 14, there's  
14 some concerns that you're diving into  
15 information that may be subject to privilege.  
16 The parties are still preparing to exchange  
17 privilege logs as I understand it, so I think  
18 that may be reserved for another time.

19 So presently I'm not compelling  
20 responses to these four interrogatories, but  
21 that is without prejudice to pursue relief in  
22 the future.

23 MR. PAUNOVICH: Your Honor, to the  
24 extent that they provide us a letter Friday, can

1 we have longer than one week because of what's  
2 going on next week?

3 THE COURT: How much longer?

4 MR. PAUNOVICH: Well, we have  
5 added four more interrogatories and we have the  
6 one on the 28th, if we're able to get some more  
7 leeway on the 28th, that will be appreciated but  
8 we can go for the 28th.

9 THE COURT: Go for the 28th, and  
10 if there's issues I'm sure the parties will be  
11 discussing timing issues when they see each  
12 other at depositions or some other time.

13 MS. MURRAY: I would just ask if  
14 we can have more time, if we can have more time  
15 than the two days?

16 THE COURT: Work it out, whatever  
17 is a sufficient time frame. I'm trying not to  
18 go too far afield of the December 21 cut-off,  
19 but I certainly understand. So if the  
20 Plaintiffs need more time, then Defendants ought  
21 to have a leave of 10 days to respond depending  
22 on the intervening depositions and holidays  
23 there are.

24 And that brings us to subpoenas to

1 UCSB. Is that resolved?

2 MS. MURRAY: It hasn't been  
3 resolved, Your Honor. So counsel for Olaplex is  
4 not here, Mr. Blackburn who also represents  
5 UCSB. All we really want -- we have received  
6 documents from UCSB. All we really want is  
7 Dr. Hawker and Pressly's personnel files. Now,  
8 it was termed as an employment agreement from  
9 Olaplex. And during the deposition of UCSB, it  
10 came out that they don't have employment  
11 agreements in the typical sense that  
12 corporations have employment agreements, but  
13 there are personnel files and those are  
14 maintained.

15 We just want the personnel files  
16 for Dr. Hawker and Pressly. They worked at the  
17 university. We want to know what the policies  
18 were with respect to them using the university  
19 facilities and things of that nature. That's  
20 all we're asking for, the personnel files.

21 THE COURT: But the personnel  
22 files potentially have, and I'm just  
23 speculating, reviews, performance reviews, sick  
24 days, family leave. Things that would be of a

1 private nature.

2 MS. MURRAY: We don't want  
3 anything private. We don't need that and they  
4 can redact that. We just want policies that  
5 were in place and applied to them. We don't  
6 know when their start date was. I asked the  
7 witnesses. We put it in as a 30(b)(6) topic and  
8 the witness they presented could not tell me the  
9 date that Dr. Pressly was employed at the  
10 university.

11 We're not getting it from the  
12 depositions. We're not moving to compel at this  
13 point, but can we get a document that identifies  
14 when they started and what policies were in  
15 place for the use of the facility? And also the  
16 assignments of patents, assignments of  
17 inventions, we would like to get some clarity on  
18 that.

19 So they have produced university  
20 policies. All we really want now is just the  
21 part of the personnel file that deals with when  
22 they started, how long they were employed and  
23 what the policies were in effect at the time.  
24 It's not called employment agreement but

1 whatever is akin to an employment agreement at  
2 the university.

3 MR. PAUNOVICH: Respectfully, Your  
4 Honor, I think we have to observe some of the  
5 federal rules here. UCSB has no -- there's no  
6 jurisdiction in Delaware over UCSB. This is a  
7 third party. Whether they're represented by  
8 Matt Blackburn, my co-counsel, is an irrelevant  
9 point. They subpoenaed UCSB.

10 And again following with the  
11 rules, they didn't ask for these files. I don't  
12 represent them so I don't know that information.  
13 My firm has a conflict with UCSB so I don't  
14 personally know that information. But this has  
15 been subject of correspondence between counsel  
16 for UCSB, a California public university, and  
17 L'Oreal's attorneys.

18 As I understand it, they did not  
19 ask for the files that they are now seeking. I  
20 would note as a casual observer that if they  
21 don't want any of the sick days and personal  
22 information and this and that, why do they even  
23 want the personnel files in the first place.  
24 But beyond that, I do think just the formalities

1 of the fact that that party is not before here,  
2 I'm not sure why we're bringing that dispute  
3 before this Court.

4 THE COURT: Ms. Murray, I've  
5 encountered issues before where I've instructed  
6 parties to go to the jurisdiction for which the  
7 subpoena was issued in order to seek relief or  
8 compliance. I'm not sure that there's any  
9 relief that the District of Delaware can give.

10 If you narrowed your request just  
11 for length of employment, policies regarding use  
12 of university facilities and patent assignments  
13 and inventions, I'm not sure why there would be  
14 a reluctance or a resistance on the part of  
15 counsel for UCSB to provide that information.  
16 But you are in a better position to know that  
17 than me.

18 MS. MURRAY: I don't know either  
19 why they won't give it to us because we  
20 basically just want to know when did they start  
21 and what policies were in place at the time. We  
22 were just trying to get guidance from the Court  
23 given that the same counsel represented them, if  
24 they can work with UCSB. We're trying to move

1 things along. We don't want to delay the  
2 schedule.

3 We could open a case in the  
4 Central District of California and try to move  
5 to compel that way, but we just think because  
6 the Court has access to the same counsel, if we  
7 can get some help in just getting this narrow  
8 information from Mr. Blackburn --

9 THE COURT: I just can't put  
10 Plaintiffs' counsel in a position if there's  
11 some conflict --

12 MS. MURRAY: Well, co-counsel  
13 represents them. Mr. Blackburn represents them.

14 THE COURT: Mr. Paunovich, is  
15 there any assistance that can be provided to  
16 move this matter along?

17 MR. PAUNOVICH: We shifted. They  
18 said we want the personnel file. We don't want  
19 anything actually in it. And then counsel said,  
20 we're looking for the policies and when they  
21 started. My understanding is the university  
22 policies so, for example, what they're really  
23 getting at is does UCSB has any ownership right  
24 in these patents.



1 All of those policies as to my  
2 understanding have been produced and they  
3 examined a 30(b)(6) witness who is an incredibly  
4 intelligent and well-prepared 20- or 30-year  
5 lawyer for the university on these very  
6 subjects. They didn't like the answers they got  
7 because it doesn't support some defense or  
8 standing argument and they want something more.

9 They have the policies much in the  
10 same that they said. I can't give you more on  
11 that, that we don't have. They have the  
12 relevant policies. For the personnel file, I  
13 don't know the answer to that or frankly, why  
14 it's relevant to anything.

15 Certainly, I can speak with my  
16 co-counsel who represents UCSB and see if he can  
17 work with them in some way to coordinate that.  
18 Beyond that, I don't have any power over UCSB.

19 THE COURT: And the Court so  
20 agrees. I would instruct L'Oreal to use  
21 whatever means are necessary. And to come down  
22 the line for requiring some type of form of  
23 order from this Court, I'm not sure what type of  
24 order I would fashion if the parties and counsel

1 that are subject to this are all out in  
2 California. I'm not going to compel the  
3 Plaintiffs to produce this information.

4 MS. MURRAY: I understand, Your  
5 Honor. My one concern is you mentioned with  
6 respect to the third parties we can come back  
7 here and try to fashion something or provide an  
8 order. Are we going to have that same issue?  
9 Some of these stylists are not all in Delaware.  
10 I don't know that any of them are in Delaware.  
11 So how are we going to be facing the same  
12 problem if the Court issues an order on these  
13 third parties?

14 THE COURT: Again, it's depends on  
15 the location of the witness. I don't know where  
16 they're located. You're correct, there may be  
17 an issue as to the extent to which the Court has  
18 enforcement power over the subpoena of the third  
19 parties.

20 MS. MURRAY: And we can take care  
21 of that and handle enforcement. The bigger  
22 issue on the third parties, a lot of them are  
23 saying, well, we don't have to offer to you  
24 because we understand there's this cut-off on

1 the 21st. And what we would like to do is to  
2 let these witnesses know that we are requesting  
3 relief from the Court so that can give us other  
4 dates beyond --

5 THE COURT: Well, it may be as  
6 simple as sending over a joint stipulation with  
7 respect to the third-party witnesses that you  
8 may have to go through the hoops of issuing  
9 subpoenas from other districts, just a  
10 stipulation that the Court has approved for the  
11 purpose of getting these depositions in, an  
12 extension of the discovery deadline so they  
13 don't feel that December 21st was an absolute  
14 cut-off. Maybe it's as simple as an extension  
15 of discovery for a limited purpose.

16 MS. MURRAY: That makes sense.  
17 Thank you.

18 MR. PAUNOVICH: Your Honor, it  
19 would be Olaplex's intention to not stipulate to  
20 that and request briefing on that subject. We  
21 really feel rope-a-doped in this situation where  
22 we go 24 months in litigation and then two dozen  
23 third parties are subpoenaed at the very last  
24 minute.

1 We have prosecuted our case  
2 diligently and we are going to be bringing in  
3 all of the depositions and evidence by a  
4 deadline. We've got an incredibly compacted  
5 schedule. And if L'Oreal is previewing some  
6 plan for these grand counterclaims, it would be  
7 our intention for whatever those are and what we  
8 think these third parties are directed to seek  
9 bifurcation of any claims that are totally  
10 unrelated, permissive and don't arise from the  
11 original transaction.

12 So respectfully, we would request  
13 briefing if that does happen because we would  
14 not be in agreement to extend any schedule. We  
15 would want to get to trial. We have a  
16 preliminary injunction that we hope Judge  
17 Bataillon will enter and we want to move the  
18 case forward.

19 THE COURT: I understand your  
20 issue, but I think there's a central issue here  
21 and there may be a lot of tentacles flowing from  
22 it. The issue here that I'm trying to resolve  
23 is one that I don't see candidly as being  
24 created by L'Oreal. Certainly, there's always a

1 risk in terms of timing of subpoenas that you're  
2 not going to get things in if you wait and run  
3 up on the discovery cut-off to issue them.

4 At this point, there's nothing in  
5 front of me to say that their timing was so  
6 close to the discovery cut-off as to have the  
7 Court infer some negative conduct on their part.  
8 We still have a discovery cut-off on December  
9 21st. They technically issued those subpoenas  
10 in advance of that cut-off.

11 They are being told by whoever is  
12 representing these third parties that these  
13 third parties that they didn't anticipate  
14 issues, whether they misunderstood or  
15 miscalculated on how much cooperation they would  
16 get from the Plaintiffs or whatever the reason  
17 for these depositions now witnesses are  
18 reluctant to come forward and appear absent  
19 enforcement of subpoenas, and here these  
20 witnesses are going to rely on the discovery  
21 cut-off as a sword.

22 All I'm saying at this point is  
23 under those circumstances, I think it would be  
24 quite appropriate for the Court to issue an

1 order extending the discovery cut-off to get  
2 those witnesses in. Now, if you feel that  
3 Olaplex must move forward and that there's too  
4 many witnesses and the testimony will be  
5 cumulative or disproportional, that there should  
6 be limits on the timing of how much hours these  
7 depositions should go short of the full seven  
8 hours issued, if you feel that it's a waste of  
9 time and L'Oreal uses its time remaining for  
10 deposition limits to do them and it shouldn't be  
11 granted any further leeway -- these are all  
12 other tentacles as I said that come off of this.  
13 I'm just trying to deal with the imminent  
14 problem of getting these witnesses to testify in  
15 the first place.

16 If there's other relief or reasons  
17 that you feel that not all of these witnesses  
18 should be taken or should be limited in scope or  
19 limited in time for whatever reason or relief  
20 you're seeking, I think that's another issue for  
21 another day.

22 You're free to raise it with the  
23 Court, but it sounds like the parties haven't  
24 even met and conferred on some aspect of that.

1 There may be a path forward to work it out. I  
2 don't know.

3 MR. PAUNOVICH: That's fair, Your  
4 Honor. We will brief those issues for another  
5 day. Thank you.

6 THE COURT: All right. Is the  
7 30(b)(6) witness left or is that for another --

8 MR. PALYS: Your Honor, I know  
9 it's late but we really would like to discuss  
10 the protective order issue.

11 THE COURT: The protective order,  
12 I understand.

13 MR. PALYS: Is the Court willing  
14 to hear?

15 THE COURT: I am going to hear it.  
16 I said I would and I will.

17 MR. PALYS: Hopefully, because  
18 we're at the end of this hearing, Your Honor, I  
19 know we're all tired, but the gravity of this  
20 one I don't want it to lose its bite. It  
21 doesn't have anything to do with presentation  
22 and trying to make theatrics here. This is a  
23 serious issue, Your Honor, and it boils down to  
24 protective order violation.

1 Let me preface it by saying  
2 L'Oreal's sensitive financial information has  
3 been put into the public eye by Olaplex's  
4 counsel just days after we had a discussion with  
5 Her Honor about the concerns that we had about  
6 our information being put out there in the  
7 public domain.

8 Let me preface this or at least  
9 begin with this argument. So Olaplex has  
10 committed two protective order violations. The  
11 first violation relates to Defendants' third  
12 supplemental objections and responses to  
13 Plaintiffs' secondary interrogatory.

14 Within that interrogatory that  
15 Olaplex has submitted as an exhibit is L'Oreal's  
16 financial information, and we have copies and we  
17 can certainly give that to Your Honor. But rest  
18 assured, it includes very important information  
19 from our client. Honestly, our client is beside  
20 themselves that this information is out there,  
21 and we have to explain to them why the  
22 protective order didn't protect their  
23 information.

24 So what happened? On November 16,



1 2018 on Friday evening after close of business  
2 of the PTAB, Mr. Blackburn, who is counsel for  
3 PGR and also litigation counsel, his team or he,  
4 himself, publicly filed this document as Exhibit  
5 27. And because they waited until the end of  
6 that day on Friday after evening when they  
7 discovered this, Mr. Blackburn had sent an email  
8 to the PTAB and said, oh, this shouldn't have  
9 been made public, please remove it.

10 The problem was that was  
11 after-hours. So it sat on the public site  
12 Friday evening, Saturday, Sunday, all the way up  
13 through Monday just before noon which is when  
14 the PTAB finally acknowledged, oh, yeah, we  
15 changed the designation so it's not available.

16 Now, I know I've jumped ahead a  
17 little bit because it's getting late. Their  
18 argument is going to say it was an honest  
19 mistake. Inadvertent, advertent, whatever, it  
20 still happened. I believe that the color that  
21 happened before this response that we're hearing  
22 from Olaplex and we heard Mr. Blackburn say,  
23 it's unfortunate that this happened. We think  
24 that color -- the activities or the events that

1 occurred before they were put to task on this  
2 issue is important. What is that?

3 So after Mr. Blackburn sends this  
4 email to the Board on Friday evening right after  
5 it happened, what did he do? Nothing. It sat  
6 there. Did he contact any of the third parties  
7 or start looking through the Internet? Did he  
8 contact the litigation counsel? Did he contact  
9 PGR counsel? Yes, he sent an email and said  
10 that this happened. But what was he doing and  
11 his team doing to rectify this situation?  
12 Nothing.

13 The only reason -- and it didn't  
14 come out in our letter because we wanted to be  
15 brief in our letter, the only reason that any  
16 actions were starting to be taken care of in  
17 what Olaplex puts in their letter, look what  
18 we've done to rectify this situation is after  
19 litigation counsel, us, contacted him and said,  
20 hey -- and we have all of these communications,  
21 Your Honor, all of the emails, I have them here.  
22 I'm not going to waste too much time reviewing  
23 them, but shows the lack of understanding of the  
24 gravity of the situation by Mr. Blackburn.

1 We pointed out, hey, what are you  
2 doing to fix this problem? We noticed on Docket  
3 Navigator it's there. His response was not, oh,  
4 I'm sorry, it's unfortunate. It's, oh, thank  
5 you for identifying that. I'm going to contact  
6 them to take it down. Seven hours later we get  
7 an email that it was taken down.

8 What else did he do? Nothing. So  
9 L'Oreal has to police its own information that's  
10 been put out there, and I can go through the  
11 examples but I will just get to the point. We  
12 think it's absolutely clear that it's been a  
13 clear violation of this Court's protective order  
14 near days that we were imploring the Court to  
15 please protect our information. You didn't see  
16 it our way in terms of the protective order that  
17 we were looking for. But it was pretty clear in  
18 that discussion we had concerns and this  
19 happened. Mistake or not, it happened.

20 This issue was brought up to the  
21 PTAB. And the reason I mentioned that is  
22 because my understanding is that the Board  
23 actually wants to hear from this Court on this  
24 issue, so they're waiting to hear how this plays

1 out before they rule.

2 I believe they have another  
3 follow-up call. PGR counsel and Mr. Blackburn  
4 had this discussion with the PTAB. And there's  
5 a transcript. If the Court wants it, we can  
6 provide it to you, but there were concerns from  
7 the PTAB. They said that they understand that  
8 we're going to talk about this today and they  
9 wanted to hear from you.

10 What we're asking for here, Your  
11 Honor, at least in this case is somewhat in the  
12 lines of what the PGR counsel is asking from the  
13 PTAB. But honestly, it's very hard to quantify.  
14 How do we quantify the level of damage that's  
15 out here?

16 Let me put it in examples so the  
17 Court can appreciate it. It's not just this  
18 case. It's just that our financial information  
19 was provided and Olaplex's people may have had  
20 access to it and it's not limited to just a  
21 ramification of this case.

22 The competitors of L'Oreal now  
23 could have accessed this. We don't know if they  
24 accessed this financial information which goes a

1 long way. It could affect them years down the  
2 road in another litigation or some business  
3 transaction. We don't know so it's hard to  
4 quantify that.

5 The best we can do is again come  
6 to this Court and say, help us protect our  
7 information. What can we do to make sure that  
8 this doesn't happen. Mr. Blackburn who's not  
9 here -- every time we have a protective order  
10 issue he doesn't show up for an argument. He  
11 could explain this.

12 But when he went to file this or  
13 whoever filed this, he made a representation in  
14 the email to us and said, you know what, by  
15 default when you go to use the e2e system in the  
16 PTAB, it designates information public or  
17 private and you know that, right. Well, that's  
18 not the full story.

19 There's actually protections in  
20 the e2e system that gives you a pop-up that  
21 says, are you sure, do you want to put this on  
22 as public or private. It gives a warning to the  
23 person filing this. And the reason why I bring  
24 this up is because there wasn't enough caution

1 taken. We just got a recent production just a  
2 few days ago from the prosecution counsel that  
3 we're going to be taking deposition of in this  
4 case and there's communications from the PGR,  
5 it's all public.

6 And I found interesting, I saw a  
7 communication from Matt Blackburn to the Board.  
8 He's saying, out of abundance of caution we're  
9 going to designate a certain exhibit private,  
10 but then we want to withdraw it later, so he  
11 knew about the caution.

12 I just found it interesting that  
13 the one document that happened to make its way  
14 through is probably one of the top two most  
15 sensitive documents that could make its way  
16 through the Internet. Again, mistake or not it  
17 doesn't matter.

18 So in terms of relief, Your Honor,  
19 I'm not sure what else we can do. But for the  
20 first thing, I felt like the PTAB had a good  
21 example or at least a suggestion, we think that  
22 this Court should order Olaplex to pay for a  
23 third-party service to go through and start  
24 polling the Internet and find out what other

1 services and who else may have downloaded this  
2 information.

3 Now, as we pressed Mr. Blackburn  
4 to do this with Docket Navigator, Unified  
5 Patents, these different reporting services, he  
6 would follow back and say, oh, we looked at them  
7 and they said they've taken it down. That's  
8 fine. There may be others. But what we don't  
9 know is who downloaded that information, so  
10 that's one. We feel it should be a mutually  
11 agreed third-party service that Olaplex has paid  
12 for and they report back and do what they can to  
13 make sure that this information is taken down.

14 The second thing is obviously we  
15 want to reimburse our client for the fees and  
16 cost with respect to this issue. Mistake or no  
17 mistake L'Oreal seems to always be taking it on  
18 the chin when it's their information that's  
19 getting loosely used by Olaplex and its counsel.

20 THE COURT: The fees and cost  
21 for --

22 MR. PALYS: Relating to dealing  
23 with this protective order issue, Your Honor.  
24 It's reasonable.

1 THE COURT: Both here and in the  
2 PTAB?

3 MR. PALYS: I don't know if you  
4 actually have jurisdiction for --

5 THE COURT: I know. You're  
6 anticipating my next question.

7 MR. PALYS: For here, Your Honor,  
8 and I believe PGR counsel can pursue that with  
9 the PTAB.

10 THE COURT: Well, that was my  
11 first question. Why is this even coming before  
12 me? Isn't this an issue that the parties ought  
13 to be dealing with in the PTAB?

14 MR. PALYS: No, it's this  
15 protective order that was violated, Your Honor.  
16 So there's a protective order that I want to  
17 touch on, on this second violation issue that I  
18 want to talk about. They have their own  
19 protective order and their own issues. We are  
20 only asking for things that you can control.

21 THE COURT: Understood.

22 MR. PALYS: And frankly, I think  
23 there should be some representation just to be  
24 sure written or in some way of knowing that



1 Olaplex itself, any of its employees, people who  
2 were not entitled to see this information under  
3 the protective order did not download that  
4 information while it was available, because we  
5 don't know if that's not the case. That's where  
6 we stand on this first protective order  
7 violation.

8 The second violation -- it's  
9 actually two violations, Your Honor. One is  
10 PTAB-related so we're not asking the Court to  
11 touch on that, but we believe it's a straight  
12 violation of the protective order that was  
13 entered in the '954 proceeding, which  
14 specifically calls out by the way that use of  
15 any information in that proceeding is limited to  
16 that proceeding, you can't use it.

17 So what happened? Let me set the  
18 stage. So we had a discussion with Her Honor on  
19 the use of some material from this case into the  
20 PGR proceeding that was pending, and that was  
21 the '954 proceeding.

22 THE COURT: Right, and I limited  
23 that ruling to specific documents that were  
24 identified as opposed to general categories of

1 documents, but I don't recall expressly  
2 restricting the ruling to the '954 patent PGR  
3 proceeding even though it was made in that  
4 context with the understanding it was brought up  
5 in the context of what could be used from this  
6 litigation in a PGR proceeding. So if it was  
7 used in the '419 proceeding even though it came  
8 up in the context of the '954 patent proceeding,  
9 tell me how that is significant.

10 If I would have allowed it for  
11 one, I would have allowed it for another. My  
12 concern was on cabining and restricting what  
13 documents could be used here and go over there.

14 MR. PALYS: So there are a couple  
15 of responses to that, Your Honor. First, it  
16 goes to something very similar to the Motion to  
17 Compel, which is you've got to look at what  
18 happened, transpired, what did they do in their  
19 Motion to Compel to convince the Court to grant  
20 their motion. Same thing here, what did Olaplex  
21 tell this Court when they were saying, hey, let  
22 us use this information in the PGR proceeding.

23 If you look at the transcript, the  
24 November 1st transcript, Page 5, Lines 9 through

1 12, this is Olaplex saying, we want to use this  
2 information with the '954 patent. Page 5, Lines  
3 20 to 21, we're looking to do the same thing in  
4 the '954 PGR. Page 22, Line 22 to Page 23, Line  
5 1, we would like to use it in the '954 PGR to  
6 demonstrate nonobviousness. Over and over they  
7 were referring to the PGR.

8 Now, you might hear Olaplex's  
9 counsel saying, well, I saw a plural word, I say  
10 PGR proceedings. And even Her Honor used the  
11 word PGR proceedings, but that couldn't be. And  
12 this is why it couldn't apply to the '419  
13 because the '419 was over.

14 That jurisdiction didn't even  
15 exist to the PTAB at that point because it was  
16 up at appeal at the Federal Circuit, so it would  
17 be impossible to supplement the record or even  
18 submit evidence into the '419 at that time.  
19 That's why all of these representations you see  
20 that they wanted to use it in the '954. So we  
21 believe that the order was limited and it could  
22 only have been limited to the '954.

23 THE COURT: By the time the Fed  
24 Circuit gets appeals, they have their own set of

1 rules for filing documents under seal and --

2 MR. PALYS: That's true, Your  
3 Honor. I'm going to get to that, and here is  
4 the problem with that: The record is closed  
5 when you go up to the Federal Circuit. I'm  
6 preaching to the choir here, but you file a  
7 joint appendix, the record cannot be  
8 supplemented with something.

9 So even if they tried to add a new  
10 document which they essentially did, which  
11 violated one of the Federal Circuit rules, I  
12 don't know if they realized this, when you try  
13 to do a redaction, it has to be documents of the  
14 record below, not new things. But having said  
15 that, the point is we absolutely believe that  
16 the order had to be limited to the '954  
17 proceeding.

18 So what happened? They took one  
19 of our documents that was submitted in the '954  
20 proceeding and they quoted it in their reply  
21 brief. Now, they redacted it in the public  
22 version. We're thankful for that. We don't  
23 have an issue with that. They did redact it.  
24 But the issue is the fact that they were even

1       trying to use this information in another  
2       proceeding, much less the '419's appeal is a  
3       clear violation that we believe of what this  
4       Court was giving the authority to use our  
5       information for the '954.

6                   THE COURT: Well, supposed if it  
7       were going up to the Supreme Court, as a  
8       magistrate judge I'm supposed to restrict what  
9       the Supreme Court has available to look at?

10                  MR. PALYS: Your Honor, you're  
11       chuckling but this is really serious --

12                  THE COURT: I understand the  
13       significance. I'm not making light of it. I'm  
14       just trying to understand the interplay of what  
15       my role is in terms of protection when you are  
16       in a higher court that is very cognizant,  
17       particularly the Fed Circuit of the sensitivity  
18       of information that it's dealing with on appeal.  
19       I'm just not sure you're getting there as to  
20       what I can do and how this is problematic for  
21       all of you.

22                  MR. PALYS: It's problematic  
23       because they, again, have taken our confidential  
24       information and put it into a proceeding that

1 wasn't what the information was supposed to be  
2 used for. Now, the Federal Circuit has  
3 mechanisms to provide. You can refer to other  
4 documents, judicial notice type of documents.  
5 Those are public documents.

6 We're talking about something  
7 that's confidential. Why did they do this?  
8 They wanted to -- they kind of alluded this in  
9 their letter. They wanted to take a statement  
10 out of context to make us look bad without the  
11 ability for a rebuttal on that. Regardless of  
12 the motivation for that, what we have here is we  
13 believe another violation. I believe even the  
14 PTAB was kind of looking at it in terms of  
15 technical violation as well.

16 The last point on this '954, '419,  
17 one thing that they didn't give Your Honor when  
18 that discussion was going on, they didn't give  
19 you a copy of the '954 patent protective order,  
20 when you were saying the information will be  
21 protected on either side. And in fact, I  
22 believe the PTAB even mentioned this is the  
23 problem when you have competing protective  
24 orders between the PTAB and the District Court.

1 At the end of the day we believe  
2 it is a violation. What are we asking for?  
3 We're simply asking for an order to tell them to  
4 withdraw that document, withdraw what you filed.  
5 That's all we're asking for because we think it  
6 was improper and it was beyond the scope of the  
7 authority of the use of our documents.

8 Obviously with respect to this  
9 issue and the first issue, Your Honor, we're  
10 open to any suggestions that Her Honor has to  
11 help us to protect our information so we can go  
12 back to our clients and say, we're doing the  
13 best we can to protect your information, because  
14 this isn't the first time that this had  
15 happened.

16 It happened when they filed their  
17 Complaint. It happened when they filed their  
18 Federal Circuit appeal brief for the '419. We  
19 had to tell them that they violated their  
20 authority, and then they had to withdraw. Thank  
21 you.

22 MR. PAUNOVICH: Your Honor, I will  
23 start with the first point and I just want to be  
24 absolutely clear that Plaintiffs take these

1       allegations incredibly seriously. We didn't  
2       have notice yesterday that L'Oreal was going to  
3       file the letter that they did with the Court,  
4       and the Court gave us about a three-hour window  
5       to provide a response which we did.

6               There was no relief requested in  
7       that letter and the relief that's now being  
8       requested is also very serious. L'Oreal's  
9       counsel says intent doesn't matter, but it does.  
10      And this was an honest and inadvertent mistake  
11      which happens very rarely. A lot of these other  
12      allegations which I will address, but it happens  
13      very rarely. But when it does, Paul Hastings,  
14      Quinn Emanuel, the courts, a lot of folks  
15      recognize that sometimes these inadvertent  
16      things do happen.

17             The bombastic story that was told  
18      by L'Oreal could not be further from the truth,  
19      and we didn't have an opportunity to get this  
20      all in our letter on the short notice. But  
21      Mr. Blackburn my co-counsel, there was an  
22      administrative filing mistake in checking boxes  
23      among the many, many exhibits, forgot to check  
24      the box for one exhibit not to be public.



1 It was not purposeful. Nobody  
2 from Olaplex has downloaded this information.  
3 They've had numerous meet-and-confers with the  
4 Paul Hastings firm as well as the PTAB firm  
5 that's handling L'Oreal's dispute. No one has  
6 identified anyone who has downloaded this  
7 document from the Internet.

8 Mr. Blackburn immediately realized  
9 his mistake in three minutes from the filing  
10 that I forgot to check that box. He emailed the  
11 PTAB, the Board and PGR counsel and said, I made  
12 this honest mistake, I'm very sorry, I'm taking  
13 action to correct this immediately.

14 This is not an issue of he got  
15 called on it. By the way, we're crisscrossing  
16 the country. This isn't Mr. Blackburn not  
17 wanting to show up here. He is incredibly  
18 conciliatory about this and feels terrible about  
19 this and has apologized up and down and been on  
20 numerous meet-and-confers.

21 We're crisscrossing the country  
22 and preparing witnesses. Otherwise, he would be  
23 here and would love to answer this for himself.  
24 There was an extensive email that he exchanged

1       just late last night with PTAB counsel  
2       describing all of the things that he has done of  
3       his own accord since this happened, self-  
4       reporting, immediately having the Board make  
5       this private again.

6               He was made aware by counsel of  
7       three companies that have mirrors of the PTAB's  
8       docket and once he knew of those, he immediately  
9       contacted them and I believe it was only with  
10      one that it had reproduced and scraped and put  
11      that document on its site and made sure it was  
12      taken down.

13             He subsequently contacted 10  
14      different mirror companies to see, do you have  
15      the documents from the docket. In all cases the  
16      other ones were simply mirrors and did not  
17      scrape the document. There's been no  
18      information of anyone accessing this document.  
19      Litigation counsel Daniel Zeilberger at a meet-  
20      and-confer yesterday or the day before with  
21      Mr. Blackburn confirmed that they have no  
22      awareness of anybody else having access to this.

23             In addition, Mr. Blackburn of his  
24      own accord has already retained a third-party

1 company, Avea, to continuously monitor for at  
2 least the next 30 days and scrape the Internet  
3 for any evidence that this document remains  
4 somewhere in a public forum or that somebody may  
5 have downloaded this. He's paying for that of  
6 his own accord. It's something like \$300 a  
7 month for the monitoring service.

8 I'm just re-reading his email here  
9 that he sent to PTAB counsel, which I'm happy to  
10 provide you the string. The bottom line is  
11 this, Your Honor, we do take this incredibly  
12 seriously. This is not something Plaintiffs are  
13 giving short trip to. It was not purposeful.  
14 The record clearly and abundantly indicates  
15 that.

16 We are willing to do what's  
17 reasonable and think we've already taken every  
18 step to ensure that this document is nowhere and  
19 that nobody has downloaded it, and we will  
20 continue doing that over the next 30 days. The  
21 relief that L'Oreal has requested for this  
22 inadvertent mistake which -- we're talking about  
23 people here that make inadvertent mistakes.  
24 It's very serious.

1 They've never told us they're  
2 seeking their fees, but whatever those fees  
3 are -- we got a letter yesterday from them.  
4 They had a meet-and-confer and here we are  
5 today. It's not to tamp down the seriousness of  
6 this. We understand that. We've taken all of  
7 the precautions on this. But to the extent that  
8 the Court is inclined to grant such serious  
9 relief, we would request at least some briefing  
10 on that.

11 I think when the Court sees the  
12 full record of what Mr. Blackburn has done in  
13 response of this completely inadvertent  
14 administrative mistake, we hope that the Court  
15 will be satisfied as well by our representation  
16 that we will do everything in our power to make  
17 sure that something like that does not happen in  
18 the future.

19 As far as the other allegations  
20 that were sort of tossed in there at the end,  
21 I'm not sure what they're referring to and I  
22 don't believe there are any violations. But  
23 again, that's not part of the briefing. If we  
24 need to address things, we're happy to do so.

1 This feels like it really is  
2 leading into the second issue which is the  
3 Federal Circuit, was there something done wrong  
4 there. Respectfully, Your Honor, you issued a  
5 ruling. I would request that the Court look at  
6 Pages 12 through 14 of that transcript where  
7 it's very clear in our colloquy and discussion,  
8 you asked me point-blank on that call, you said  
9 something to the effect of I want to be clear in  
10 what you're seeking out of this order. It's an  
11 order to use all documents produced in this case  
12 in the PGR proceedings.

13 And we had a discussion. Yes, we  
14 did discuss the '954 because there was an  
15 imminent deadline associated with that.  
16 However, we've got the proceedings on both of  
17 our patents and this information is relevant to  
18 both of them. And once it's also part of the  
19 '954 proceeding, it's part of the intrinsic  
20 record to also be part of the '419 proceeding.

21 If we really distill this down and  
22 I don't -- again, we do understand the  
23 seriousness of what's happened here. But now  
24 the relief they're requesting is let's deny to

1 our Federal Circuit the potential to look at  
2 some of this key evidence that demonstrates that  
3 they didn't invent this, that what they're  
4 telling the Federal Circuit isn't entirely true.

5 And relatedly and also not part of  
6 the briefing unfortunately because of the  
7 timing, the whole reason that that document was  
8 cited is L'Oreal itself brought a new document  
9 that wasn't part of the '419 proceeding record.  
10 It cited in that Federal Circuit opposition for  
11 the '419 proceeding, so this was in direct  
12 rebuttal to what they raised.

13 So the complaint of, well, this  
14 was not part of the record is because they did  
15 the very same thing and it was responsive to.  
16 It's a pretty telling document. The CEO of all  
17 of L'Oreal worldwide says, it would have been  
18 great if we would have invented it, but we  
19 didn't. This is in contrast to the alleged  
20 independent invention story.

21 Your Honor, I'm happy to answer  
22 any questions. I'm happy to give you the email  
23 string from Mr. Blackburn and PTAB counsel where  
24 he lays out in detail, it's more than two pages

1 long where he describes -- and this is what he  
2 was asked by the PTAB, describe the efforts to  
3 identify and mitigate public disclosure, third-  
4 party monitoring or mitigation and any forms of  
5 additional relief.

6 I think there was some inaccurate  
7 description of what the PTAB was asking for.  
8 And my understanding is that the PTAB said,  
9 okay, we understand this is serious. You've  
10 taken the actions to mitigate. We want to hear  
11 what more you might do to mitigate which is what  
12 Mr. Blackburn addresses. They by no means  
13 suggested that they were decided on what was  
14 going to happen.

15 I think the reason they were  
16 looking to this Court is, PTAB counsel said,  
17 well, there's a violation of the PTAB protective  
18 order and that wasn't true. The order from this  
19 Court allowing that document, among the small  
20 set of others, to be used in the PTAB  
21 proceedings is the real protective order that  
22 was inadvertently violated and quickly  
23 corrected.

24 So the conclusion of that first

1 call with the PTAB as I understand it was they  
2 said, okay, we now understand that really this  
3 is an issue of the District of Delaware's  
4 protective order it violated. And before we do  
5 anything, we'll just wait and see what that  
6 Court has to say about it. If you have any  
7 other questions, I'm happy to answer them.

8 THE COURT: I don't have any  
9 questions. I think this lends itself to  
10 briefing. Be seated.

11 Mr. Palys, do you want to add  
12 anything before --

13 MR. PALYS: I know we're all tired  
14 so I will try to --

15 THE COURT: Well, I have an  
16 appointment at 2:00 to make, but I don't want to  
17 rush counsel out because I want to figure this  
18 out.

19 MR. PALYS: I appreciate that. So  
20 the '954 PGR protective order was an  
21 acknowledgement like all protective orders have,  
22 I blank affirm that I have read the modified  
23 protective order. I will abide by its terms and  
24 then I will use the confidential or highly



1 confidential information only in connection with  
2 this proceeding, that's PGR proceeding.

3 So when Mr. Paunovich was saying,  
4 well, I don't see how there's a violation in the  
5 '954 protective order, them taking an exhibit  
6 that they submitted in the '954 and using it in  
7 the Federal Circuit like they did is a clear  
8 violation of that order.

9 This Court obviously is not going  
10 to address that, but I raise that because the  
11 PTAB is looking to this Court. So wherever the  
12 Court is leaning, I want to make sure there's no  
13 indication that if the Court is going to say  
14 that there wasn't a violation of this Court's  
15 protective order, it has no bearing on the PGR's  
16 protective order. I just want to make that  
17 clear.

18 Are there any other questions,  
19 Your Honor?

20 THE COURT: No questions. I think  
21 in light of the issue of violation of protective  
22 order which the Court does take really  
23 seriously, I think it's appropriate to have the  
24 parties brief the issue with declarations

1 explaining all of the facts that have been  
2 argued.

3 At this point all I have are  
4 attorney arguments, and I understand that's  
5 because of the time-sensitivity and they were  
6 submitted the day before we had the hearing and  
7 I'm not faulting counsel for that. But I think  
8 this type of an issue is deservant of  
9 declarations.

10 I would like to see the transcript  
11 of what was discussed in the PTAB about the use  
12 of the confidential material and I do want to  
13 see the email string, Mr. Paunovich, that you  
14 referred to with respect to this issue, so that  
15 can be part of any declaration that you will  
16 submit.

17 How soon can this matter be  
18 briefed because I'd like to get to this sooner  
19 rather than later?

20 MR. PALYS: We can be prepared --  
21 we're assuming it will be simultaneous  
22 submissions; is that right, Your Honor?

23 THE COURT: I think opening,  
24 answering and reply.

1 MR. PALYS: So we would open?

2 THE COURT: Yes.

3 MR. PALYS: Can we have until  
4 Monday? Is that too late?

5 THE COURT: And you've got  
6 depositions also?

7 MR. PALYS: We have depositions  
8 between now and the 21st. I'm not going home  
9 until the 22nd.

10 THE COURT: Let me ask  
11 Mr. Paunovich, if L'Oreal gets its opening  
12 position to me on Monday -- can we limit this by  
13 pages? I'm thinking a 10-page limit rather than  
14 a 20-page limit under the local rules.

15 MR. PALYS: Yes, 10 pages. I  
16 don't think we need that much.

17 THE COURT: So 10 pages opening,  
18 answering and 5 pages for the reply.  
19 Mr. Paunovich, if I get L'Oreal's brief and any  
20 supporting declarations they want to put in by  
21 Monday, how much time would you need?

22 MR. PAUNOVICH: I hate to make  
23 this ask, but I would request two weeks because  
24 I literally have the entire team out on the road

1 next week. Five depositions on Monday, I think  
2 we have 20 depositions next week or around about  
3 there. So if that's acceptable because I don't  
4 think that anyone realistically will be able to  
5 even begin looking at it until after the 21st.

6 And we would certainly accommodate  
7 L'Oreal as well. We don't want to jam you by  
8 having you give your brief by Monday. If we all  
9 want to do the briefing after the depositions.

10 MR. PALYS: We'll do it on Friday,  
11 Your Honor. That's how serious this is. We're  
12 under the same schedule as them. I'm busy,  
13 she's busy, our whole team is. If the Court  
14 would like to hear it earlier, we will put it in  
15 by Friday or Monday. We don't certainly want to  
16 extend this off any further.

17 THE COURT: Well, I am willing to  
18 give Mr. Paunovich some additional time given  
19 the nature of the number of depositions and the  
20 resources that will be put into those  
21 depositions. I'm giving Mr. Paunovich until the  
22 28th. If Defendants would need additional time,  
23 when --

24 MR. PALYS: When would our letter

1 be due then?

2 THE COURT: You can have some --

3 MR. PALYS: When you say the 28th,  
4 did you mean their response --

5 THE COURT: Theirs would be the  
6 28th. Do you want the 21st, the end of next  
7 week?

8 MR. PALYS: We will do it December  
9 21st. Thank you.

10 THE COURT: And then the reply on  
11 January 4th or do you want to do it sooner?

12 MR. PALYS: January 1st. No, I'm  
13 just kidding. The 4th sounds fine. I don't  
14 have a calendar in front of me.

15 THE COURT: I think that's a  
16 Friday.

17 MR. PALYS: So that will work,  
18 Your Honor.

19 MR. PAUNOVICH: Your Honor, we  
20 would be getting their brief now Friday the 21st  
21 which is the weekend of Christmas and the court  
22 being closed on the 24th and 25th. I don't want  
23 to overextend the asks here to the Court, but if  
24 there could be a small amount of additional

1 time. Maybe that Monday after the 28th, that  
2 would allow people --

3 THE COURT: What about the 31st?  
4 Would you be prepared to file it by the 31st of  
5 December?

6 MR. PAUNOVICH: Yes. Thank you,  
7 Your Honor.

8 THE COURT: And then the reply  
9 brief on January 4th? All of you know the  
10 issues. What I need is the declaration from  
11 Mr. Blackburn and what I need from L'Oreal is a  
12 declaration just supporting the facts as you've  
13 laid them out and any type of authorities or  
14 support that you want to give for the type of  
15 relief that you've asked.

16 I'm really interested, now that  
17 you know and you've heard the representations of  
18 Mr. Paunovich, that a third-party entity, that  
19 Mr. Blackburn has taken upon himself to engage a  
20 third-party entity at his expense to look into  
21 whether or not this confidential information  
22 appears elsewhere in the public realm, your  
23 position on that. So the parties know the  
24 issues. I'm not sure the time of filing is

1 going to make --

2 MR. PALYS: Like I said, we'll do  
3 it as soon as possible, Your Honor. We don't  
4 have an issue with the timing. On that point,  
5 you brought up a good point on the monitoring.  
6 Is there a way -- we need more information on  
7 this. Maybe we will reach out to counsel and  
8 hopefully, they will give us the information we  
9 need so we can make a proper representation to  
10 the Court in our letter.

11 THE COURT: Okay. Everybody knows  
12 what I'm looking for. The timing of it, I'll  
13 put a briefing schedule together. So the 21st  
14 of December for opening brief. The 31st of  
15 December for answering brief and declarations,  
16 and January 4th for the reply brief. And you  
17 know the information as I've stated on the  
18 record that the Court is seeking to be able to  
19 resolve this.

20 Why don't you send me over the  
21 PTAB transcript by the end of the day since you  
22 already have that. No need to wait for the  
23 brief for me to read that. I can start looking  
24 at that.

1 MR. PALYS: I have one right here,  
2 Your Honor.

3 THE COURT: If you have an extra  
4 copy, my law clerk Ms. Polito can make an extra  
5 copy and return it to you.

6 MR. PALYS: You can keep that,  
7 Your Honor.

8 THE COURT: Okay. Are there any  
9 matters on behalf of L'Oreal before we adjourn?

10 MS. MURRAY: I don't believe we  
11 have other matters.

12 THE COURT: Mr. Paunovich, on  
13 behalf of Plaintiffs any other matters?

14 MR. TIGAN: Your Honor, just one  
15 quick question: When you say 10, 10 and 5 pages  
16 on the briefs, you mean the actual briefs to be  
17 double-spaced as opposed to long letters?

18 THE COURT: Yes -- well, I don't  
19 care what format they're in. However, you want  
20 to maximize the use of 10 pages as long as the  
21 parties are observing the same format. In other  
22 words, I don't want a full formal brief from one  
23 side and a letter brief from the other. I want  
24 the size of the briefs to be fair and a level



1 playing field. Work out the format and I'm fine  
2 with whatever counsel agree upon.

3 MR. TIGAN: Thank you, Your Honor.

4 MR. PALYS: Thank you, Your Honor.

5 THE COURT: All right. Hearing no  
6 other matters, I want to thank counsel for the  
7 presentations. It was a bit lengthier than I  
8 anticipated, but I hope we made some progress.  
9 The rulings that I've made on the record, just  
10 follow the objection procedures.

11 To the extent any objections are  
12 going to be lodged, the procedure is spelled out  
13 in our local rules and under Federal Rule of  
14 Civil Procedure 72(a). With respect to any  
15 other matters that I've reserved, I will do my  
16 best to get to them promptly once I receive the  
17 supplementation needed to resolve them.

18 Thank you, counsel, and I wish  
19 everybody a happy holiday season.

20 MS. MURRAY: Thank you, Your  
21 Honor.

22 MR. PALYS: Thank you, Your Honor.

23 MR. PAUNOVICH: Thank you, Your  
24 Honor.

1 MR. COTTRELL: Thank you, Your  
2 Honor

3 MS. MOWERY: Thank you, Your  
4 Honor.

5 MR. TIGAN: Thank you, Your Honor.

6 (The proceedings ended at  
7 2:20 p.m.)

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C E R T I F I C A T I O N

I, Taneha Carroll, Professional  
Court Reporter, certify that the foregoing is a  
true and accurate transcript of the foregoing  
proceeding.

I further certify that I am neither  
attorney nor counsel for, nor related to nor  
employed by any of the parties to the action in  
which this proceeding was taken; further, that I am  
not a relative or employee of any attorney or  
counsel employed in this case, nor am I financially  
interested in this action.

/s/Taneha Carroll  
Taneha Carroll

Professional Reporter and Notary Public